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# Decoding Judicial Reasoning in China: A Comparative Empirical Analysis of Guiding Cases

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# DECODING JUDICIAL REASONING IN CHINA: A COMPARATIVE EMPIRICAL ANALYSIS OF GUIDING CASES

RUNHUA WANG\*

## ABSTRACT

The judicial system in China recently started using legal precedents—known as guiding cases—as a new legal source to eliminate adjudicative inconsistency. Guiding cases (“GCs”) present the current judicial reasoning to some extent and can be used to predict the future of judicial reasoning in China. What are GCs? What legal issues do GCs address? How do they address legal issues? How do GCs affect the legal system and adjudication in China? This Article answers these questions with empirical evidence and comparisons to judicial reasoning in the United States. It is the first empirical research providing a systematic review of all the GCs published by November 2019.

GCs are *de facto* binding and treated as legal precedents by Chinese judges, even though the literature used to heavily debate whether they are “common-law precedents.” This Article’s research rejects the dichotomy between civil law and common law in the modern age. Instead, after reviewing the development and history of law in China, this Article argues that the Chinese legal system is in fact a dynamic mix between the civil and common law systems. The empirical design revisits American jurisprudential criteria to decode judicial reasoning in China. Even though these jurisprudential criteria are debatable by themselves, the hypotheses and the coding strategy rely on their overlaps and conflicts – a public or private interest-concentrated perspective: How do Chinese courts treat the public and private interests under the various degrees of government intervention?

The empirical analyses in this Article suggest that Chinese courts are on the path towards pragmatism and that there are common characteristics of the judicial reasoning in China shared by the U.S. Supreme Court. On the one hand, judges in China are state agents and follow state policies. They address social concerns and the public interest, which do not necessarily harm private interests or suggest conflicts with private interests. On the other hand, the Chinese courts are independent from administrative agencies, even though they defer to government interpretations of law to a greater extent than the U.S. Supreme Court.

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## INTRODUCTION

Will there be a day when a robot can replace a judge? That day is near in Estonia, where an artificial intelligence (AI) judge will soon determine small claims cases.<sup>1</sup> Many universities, such as Stanford, Cambridge, and Peking, have developed AI programs to predict judicial outcomes—with up to 86.6% accuracy—and to promote settlements.<sup>2</sup> For over a hundred years, since Holmes argued that the law could one day be predicted, people have been preparing for the day when AI becomes a broadly adopted tool to facilitate dispute resolutions.<sup>3</sup> When law and legal systems develop and become increasingly dynamic,<sup>4</sup> AI, which processes a significant amount of information on the law, can predict the law and judicial behaviors more accurately than people.<sup>5</sup> However, AI has limited the ability to explain and judge the law and adjudication like judges and scholars.<sup>6</sup> Conversely, the AI used in dispute resolutions

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<sup>1</sup> See Joe Pinkstone, *AI-Powered Judge Created in Estonia Will Settle Small Court Claims of Up to £6,000 to Free Up Professionals to Work on Bigger and More Important Cases*, DAILY MAIL (Mar. 26, 2019), <https://www.dailymail.co.uk/sciencetech/article-6851525/Estonia-creating-AI-powered-JUDGE.html>.

<sup>2</sup> Tsinghua and College London also develop AI for judicial activities. See James South & Andy Rogers, *What Might Artificial Intelligence Mean for Alternative Dispute Resolution?*, KLUWER MEDIATION BLOG (Aug. 30, 2018), <http://mediationblog.kluwerarbitration.com/2018/08/30/might-artificial-intelligence-mean-alternative-dispute-resolution/>; *Could AI Replace Judges and Lawyers?*, BBC NEWS (Oct. 24, 2016), <https://www.bbc.com/news/av/technology-37749697/could-ai-replace-judges-and-lawyers>; Haoxi Zhong et al., *Legal Judgment Prediction via Topological Learning*, [http://nlp.csai.tsinghua.edu.cn/~tcc/publications/emnlp2018\\_dag.pdf](http://nlp.csai.tsinghua.edu.cn/~tcc/publications/emnlp2018_dag.pdf) (last visited July 13, 2019); Bingfeng Luo et al., *Learning to Predict Charges for Criminal Cases with Legal Basis* (July 28, 2017), <https://arxiv.org/pdf/1707.09168.pdf>.

<sup>3</sup> See generally Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

<sup>4</sup> Modern law, especially modern common law, is developing as dynamic with common-law and precedents and dynamic statutory interpretation. See William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (“Statutes . . . should . . . be interpreted ‘dynamically,’ that is, in light of their present societal, political, and legal context.”); See *infra* Part I.

<sup>5</sup> Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1150 (2004) (“The model predicted 75% of the Court’s affirm/reverse results correctly, while the experts collectively got 59.1% right.”).

<sup>6</sup> Most prediction techniques in AI (e.g., neural network) are like a black box. Either classification trees or neural network focuses on the accuracy of its prediction, rather than the process of the prediction, which is also in a black box to be unexplainable. See *id.* at 1164, 1166 n.48 (noting that most prediction approaches are a black-box besides the approach of classification trees, which is a transparent model); Zhong et al., *supra* note 2, at 3–4; Luo et al., *supra* note 2, at 4; Sharan Agrawal et al., *Affirm or Reverse? Using Machine Learning to Help Judges Write Opinions* 9 (June 29, 2017), [https://users.nber.org/~dlchen/papers/Affirm\\_or\\_Reverse.pdf](https://users.nber.org/~dlchen/papers/Affirm_or_Reverse.pdf).

demands the descriptive and prescriptive debates among judges and scholars to construct its development.<sup>7</sup>

Compared to AI predictions, empirical studies in law can provide more descriptive and prescriptive information about the law for understanding the nature and development of law and judicial systems. As early as the 1940's, C. Herman Pritchett empirically studied the votes and opinions of the Justices of the Supreme Court of the United States ("SCOTUS").<sup>8</sup> Subsequent to Pritchett, despite an increasing number of thorough empirical studies about adjudication,<sup>9</sup> scholars still expect more empirical analyses about precedents in order to understand judicial reasoning in a systematic way.<sup>10</sup> This Article employs an empirical method to systematically review all the binding legal precedents in China published by November 2019.<sup>11</sup> It provides a broad understanding of the legal rationale in China by comparing the reasoning to that of U.S. lawyers and scholars.

Recently, the judicial system in China started using a guiding case ("GC") system of legal precedents to improve adjudicative consistency.<sup>12</sup> To date, the Supreme People's Court ("SPC") has selected, compiled, and published 112 *de facto* binding

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<sup>7</sup> All the literature of legal prediction in *supra* note 2 includes a section discussing the characteristics of judicial behaviors or case law before constructing the prediction models. *See, e.g.,* Masha Medvedeva et al., *Judicial Decisions of the European Court of Human Rights: Looking into the Crystal Ball*, <http://martijnwieling.nl/files/Medvedeva-submitted.pdf> (last visited July 13, 2019) (designing a network based on various citations to predict judicial behaviors before conducting another prediction by neural networks).

<sup>8</sup> *See generally* C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES* (1948), *cited in* Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 WM. & MARY L. REV. 2017, 2019–21 (2016) (discussing the contribution of Pritchett as a political scientist in judicial science).

<sup>9</sup> *See, e.g.,* Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 61 HASTINGS L.J. 221 (2010); LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013).

<sup>10</sup> *See generally* William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976) (providing a template of systematic analyses of precedents for empirical scholars and listing several controversial or unknown questions to be answered in the future); Rogers M. Smith, *The "New Institutionalism," and the Future of Public Law*, 82 AM. POLITICAL SCI. J. 89, 102–04 (1988) (calling for more quantitative and qualitative research about adjudication). Empirical evidence for precedents and judicial behaviors is not consistent as the law, and judicial system are dynamic and developing.

<sup>11</sup> Legal precedents in this Article refer to precedents that are binding. *See* Mo Zhang, *Pushing the Envelope: Application of Guiding Cases in Chinese Courts and Development of Case Law in China*, 26 PAC. RIM L. & POL'Y J. 269, 269 (2017) ("China is known as a civil law country where the judges do not have law-making power and the courts generally do not follow precedent.").

<sup>12</sup> *See* Kang Weimin Jr., *Self-Perfection of the Judiciary with Socialism in Chinese Characteristics*, 8 LAW APPLICATION 2 (2011) (introducing that the intent to establish the guiding case system is to eliminate adjudicative inconsistency).

GCs to guide inferior courts.<sup>13</sup> Does the establishment of the GC system mean that China—traditionally believed as a civil law country—now has common-law precedents? Asking a question like this is a common mistake. First, China cannot be simply labeled as a civil law country.<sup>14</sup> Second, it is not essential to debate on the dichotomy between common law and civil law in front of many modern legal systems in the world.<sup>15</sup> By contrast, the establishment of the GC system means that the Chinese judicial system is increasingly mixed and dynamic because it relies on both legislative statutes and judicial law as legal sources.<sup>16</sup> Unveiling the GCs is more important to understand the legal system in China, compared to merely reviewing the statutes.

Based on the rejection of the dichotomy between civil law and common law, this Article adopts the controversial jurisprudential theories—legal formalism, legal realism, and legal pragmatism for analyzing common-law precedents—to explain the judicial reasoning in the GCs.<sup>17</sup> Western jurists, especially Americans, are familiar with these theories but do not know much about judicial reasoning in China. For example, judicial independence in China is a controversial issue to most western scholars, because the governance philosophy in China is distinguished from many western countries.<sup>18</sup> Those jurisprudential theories contribute to explore some concerns for judicial independence by asking how much courts contemplate the public interest and private interests.<sup>19</sup> This measurable question and those jurisprudential theories help explain the judicial reasoning in China to American lawyers and scholars. Therefore, this Article's empirical research is designed using a spectrum, which assembles the arguments among those jurisprudential theories from the dimensions of public and private interests. Then, this research fits the GC system to this spectrum.

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<sup>13</sup> See, e.g., Zuigao Renmin Fayuan Guanyu Anli Zhidao Gongzuo De Guiding (最高人民法院关于案例指导工作的规定) [Provisions of the Supreme People's Court Concerning Work on Case Guidance] (promulgated by Adjudication Comm. Sup. People's Ct., Nov. 15, 2010, effective Nov. 26, 2010) June 12, 2015, art. 4 (China); THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA, <http://www.court.gov.cn/shenpan-gengduo-77.html> (last visited January 21, 2020).

<sup>14</sup> See *infra* Part I.C.2. But see Zhang, *supra* note 11, at 269.

<sup>15</sup> See *infra* Part I.

<sup>16</sup> See *infra* Part I.A, I.D.

<sup>17</sup> This research adopts these three concepts of philosophy in legal analyses and the debates by legal scholars, so they refer to legal formalism, legal realism, and legal pragmatism, rather than philosophical formalism, realism, and pragmatism. See POSNER, *infra* note 19, at 105–26.

<sup>18</sup> See, e.g., RENE DAVID & JOHN BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 518–33 (1968) (concerning the governance of the communist party and its inheritance of socialism from Marxism and the U.S.S.R.).

<sup>19</sup> See, e.g., RICHARD A. POSNER, REFLECTIONS ON JUDGING 105–26 (2013) (defending pragmatism from formalism and realism argues that judges do not make law but only apply law); Smith, *supra* note 10, at 100 (arguing that creativity of judges are shown in their legal reasoning under Public Law theories).

Four hypotheses are developed based on this spectrum.<sup>20</sup> First, common-law rules and formalism are more likely to lead courts to concern private interests and ignore the public interest in their adjudication. Second, realism drives courts to be concerned about the public interest more than private interests in judicial reasoning. Third, pragmatism accepts both realistic and formalistic concerns, and courts try their best to interpret the law practically. Fourth, public interests and private interests are associated, but the direction of the association depends on the facts and the law.

In order to test these four hypotheses, this research codes (1) the characteristics of the legal issues, statutes, and judicial interpretations addressed in the GCs; (2) the characteristics of their text, structure, and logic of judicial reasoning; (3) how the GC ruling courts treated the public and private interests in adjudication; (4) the categories of the policies and social concerns behind the GCs and; (5) how these GCs involve government interpretations of laws and government decisions. The research then applies descriptive statistics to analyze the coded information and employ logistic regressions to explore the association between the characteristics of the GCs. The empirical results are arguably consistent with the hypotheses and can be explained by the jurisprudential theories from the perspectives of the public and private interests.

Comparing GCs with SCOTUS decisions suggests that the two judicial systems share mutual characteristics. First, GCs, as a source of authority for statutory interpretation, have a policy function to strengthen law enforcement. Second, Chinese courts are encouraged to be pragmatic, which is also a trend shown in the U.S. Moreover, the systematic analyses suggest that the SPC has a policy concern to instruct inferior courts to fill the gaps of statutory law with concerns about the public interest and state policies.

Part I reviews the taxonomy of civil and common law and introduces the GC system. Part II introduces the empirical study design. This Part first discusses the hypotheses for the empirical analyses and the jurisprudential theories behind the hypotheses. Then, it presents the coding strategy and discusses the limitations of the methodology. Part III describes the characteristics of the GCs by descriptive statistics and tests the hypotheses by logistic regressions. Based on the descriptive statistics and the logistic regression results, this Part compares the GCs with SCOTUS decisions. Part IV makes implications and discusses the potential future of the judicial system in China under the influence of the GC system.

## I. CIVIL LAW AND COMMON LAW IN MODERN LEGAL SYSTEMS

In the literature discussing GCs, scholars, especially Chinese scholars, heavily debate the question of whether the GCs are legal precedents or common-law precedents.<sup>21</sup> Civil law and common law are two distinct legal traditions.<sup>22</sup> They are

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<sup>20</sup> See *infra* Part II.A.

<sup>21</sup> See Mark Jia, *Chinese Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213, 2231–34 (2016); Deng Jintong, *The Guiding Case System in Mainland China*, 10 FRONTIERS OF L. IN CHINA 1, 2 (2015) (arguing that China has common law in reality); Yang Li, *Practice and Theory of the Guiding Case System in China*, 46 HONG KONG L. J. 307, 333 (2016) (arguing that China will look for a balance between common law and civil law for the emergence of the GCs).

<sup>22</sup> Russell A. Miller, *Germany's German Constitution*, 57 VA. J. INT'L L. 95, 101 (2017).

utterly disparate in sources of law, jurisprudence, legislation, adjudication, and legal education.<sup>23</sup> Civil law systems originated from Roman Law.<sup>24</sup> They further evolved from the formal written law to systematic codifications and compilations.<sup>25</sup> By contrast, common law was not gained from Roman Law.<sup>26</sup> Rather, common law, known as judge-made law,<sup>27</sup> was mainly developed from England and other English-related countries.<sup>28</sup> Traditional common law is a bundle of rules,<sup>29</sup> adopting legal precedents, rather than codifications.<sup>30</sup> Nowadays, however, scholars have noticed that the boundary between the civil law and the common law is increasingly obscured. Modern common law systems moved first and inevitably started adopting legislative statutes and “unprecedented” law in the 19th century.<sup>31</sup> Modern civil law systems also developed to be dynamic and embraced legal precedents in their sources of law.<sup>32</sup> Moreover, there are mixed jurisdictions, such as China, which inherit or consult both legal traditions.<sup>33</sup> Because of the development of modern legal systems and the appearance of mixed jurisdictions, this Part discusses why the dichotomy of civil law and common law is outdated. Therefore, the arguments about this dichotomy are not necessary to be addressed in understanding GCs.

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<sup>23</sup> John Henry Merryman, *How Others Do It: The French and German Judiciaries*, 61 S.C.L. REV. 1865, 1865 (1988) (listing the differences of the two legal traditions, including “[t]he peculiar national histories and traditions, the specific structures and processes of legal education, legal scholarship, law-making, executive,” administrative action, “prevailing paradigms of the legal process,” legal sources, methods of finding and applying the law, and what judges are and what they do in the legal systems of the two legal traditions.).

<sup>24</sup> Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419, 420 (1966–1967).

<sup>25</sup> *Id.*; see also William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 680 (2000).

<sup>26</sup> R.C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* 1–3 (1973) (recognizing some effects of Roman Law on some common law notions and procedures).

<sup>27</sup> *Id.* at 12.

<sup>28</sup> DAVID & BRIERLEY, *supra* note 18, at 309.

<sup>29</sup> See generally *Id.*

<sup>30</sup> CAENEGEM, *supra* note 26, at 12.

<sup>31</sup> DAVID & BRIERLEY, *supra* note 18, at 330–31 (introducing the modern reforms of the common law in the 19th century to face unprecedented development of legislation).

<sup>32</sup> See Miller, *supra* note 22, at 101.

<sup>33</sup> Tetley, *supra* note 25, at 684 (“A mixed legal system is one in which the law in force is derived from more than one legal tradition or legal family.”).



### A. Modern Civil Law Systems

In modern practice, civil law systems are increasingly using previous judicial decisions as legal sources, even though these decisions, in general, are not binding.<sup>34</sup> Only some particular previous legal cases are binding as common-law precedents in some civil law countries.<sup>35</sup> For example, the opinions from the German Federal Constitutional Court are binding upon all German courts.<sup>36</sup> In order to improve adjudicative consistency, a preliminary ruling by the Joint Panel of the Supreme Courts of the Federation will be provided for the five German Federal Supreme Courts before the Courts make any deviant decisions.<sup>37</sup> Moreover, civil law practitioners (*e.g.*, in Germany) treat consistent case decisions as an independent legal source.<sup>38</sup> These practitioners increasingly cite previous judicial decisions in front of judges.<sup>39</sup> Civil law courts also unavoidably apply legal precedents in particular cases due to the vagueness of the codes (*e.g.*, France).<sup>40</sup>

Besides the endogenous needs of improving adjudicative consistency, wars, colonial power, and other international relationships exogenously impact the development of civil law systems. For example, the civil law system in Japan adopted judicial decisions as a legitimate source of law under the influence of the U.S., a common law country, after the Second World War.<sup>41</sup> The Supreme Court of Japan summarizes cases in volumes of Catalog Records and its inferior courts, in general, shall comply with the decisions of the Superior Court in addition to the statutory laws.<sup>42</sup>

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<sup>34</sup> Dainow, *supra* note 24, at 426.

<sup>35</sup> See Huang Yaying, *Preliminary Review of the Problems of Constructing the Case Guidance System in China*, 1 COMPARATIVE LEGAL STUDIES 2 (2012); see generally CAENEGEM, *supra* note 26; Goto Takehide, *The Effects of Precedents on Japanese Law in the Modern History*, 1 COMPARATIVE LEGAL STUDIES 75 (1997); Ninon Colneric, *Guiding by Cases in a Legal System Without Binding Precedent: The German Example*, STANFORD LAW SCHOOL CHINA GUIDING CASES PROJECT (June 19, 2013), <https://cgc.law.stanford.edu/commentaries/7-judge-colneric/>.

<sup>36</sup> See generally Colneric, *supra* note 35.

<sup>37</sup> *Id.*

<sup>38</sup> See generally, *e.g.*, KONRAD ZWEIGERT & HEIN KOTZ, INTRODUCTION TO COMPARATIVE LAW (1987); see also John Bell, *Comparing Precedent*, 82 CORNELL L. REV. 1243, 1244 (1997).

<sup>39</sup> Dainow, *supra* note 24, at 427.

<sup>40</sup> See, *e.g.*, *id.*

<sup>41</sup> See generally Kenzo Takayanagi, *Contact of the Common Law with the Civil Law in Japan*, 44 AM. J. COMP. L. 60, 60–69; Yaying, *supra* note 35; CAENEGEM, *supra* note 26.

<sup>42</sup> See generally Takayanagi, *supra* note 41; Yaying, *supra* note 35; CAENEGEM, *supra* note 26; Takehide, *supra* note 35.

Modern civil law systems are dynamic with the involvement of common-law precedents.<sup>43</sup> Statutory law is the core of the civil law tradition,<sup>44</sup> even though codifications that the civil law systems rely on are not entirely identical to statutory law.<sup>45</sup> Statutes could be reformed based on the development of common-law precedents. Common-law precedents may also triumph over civil law codes, which frame the statutory law and function as a base law when courts apply the statutes.<sup>46</sup> Therefore, comparative law scholars, David and Brierley, criticize the label of civil law based on the use of codes.<sup>47</sup> Other scholars also criticize this label from a constitutional law perspective. Miller and Murphy have discussed the rise of constitutional law, which increasingly appreciates private rights in the civil law countries and suggests an invasion of common law.<sup>48</sup> This invasion happens because the democracy embedded in constitutional interpretation is derived from common law.<sup>49</sup>

### *B. Common Law and Statutes*

Common law systems have modern movements to include legislation and statutes in legal sources.<sup>50</sup> The old-fashioned common law in the 19th century was “individualistic,” meaning that the law was to adjust private interests, but not public interests or obligations.<sup>51</sup> This individualistic concept does not prevail anymore in the

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<sup>43</sup> See generally Miller, *supra* note 22.

<sup>44</sup> *Id.* at 109 (“The civil law tradition emphasizes statutory law.”).

<sup>45</sup> *Id.* at 118–20 (explaining that codifications are the basic law and the courts apply statutes according to the codifications).

<sup>46</sup> *Id.* at 114–18 (arguing that German Constitutional Law that includes binding precedents has possibilities to triumph over “civilian formalism and positivism” that are the tradition that the German Civil Code).

<sup>47</sup> See DAVID & BRIERLEY, *supra* note 18, at 22–24 (using Romano-Germanic family to describe conventional civil law systems because the civil law system is a narrow definition compared to Romano-Germanic family).

<sup>48</sup> See Miller, *supra* note 22, at 109–12 (introducing the conflicts between the common law character of constitutional law and the civil law); Walter F. Murphy, *Civil Law, Common Law, and Constitutional Democracy*, 52 LA. L. REV. 91, 94, 104–13 (1991) (criticizing the lack of democracy in civil law and discussing the contribution of constitutionalism on democracy).

<sup>49</sup> See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (arguing that a nexus exists between U.S. Constitutional law and the common law).

<sup>50</sup> See, e.g., DAVID & BRIERLEY, *supra* note 18, at 330 (introducing that legislation is a source of English law, and U.S. law includes more written statutes than English law).

<sup>51</sup> Thomas Mackay Cooper, *The Common and the Civil Law-A Scot's View*, 63 HARV. L. REV. 468, 474 (1950); Duncan Kennedy, *Form Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976).

modern common law systems, where individualism is broadly rejected.<sup>52</sup> Public welfare is addressed by legislators in statutes and by judges in common-law rules.<sup>53</sup> In statutory interpretation, modern judges do not create law, but only apply the law to the facts.<sup>54</sup>

Common-law judges used to follow legal formalism or realism to analyze only case law and other common law doctrines.<sup>55</sup> Traditionally, formalistic judges apply the canons and common-law principles deduced from the precedents,<sup>56</sup> which resemble the syllogism for interpreting civil law statutes.<sup>57</sup> With the rise of legislation and statutes, formalism and realism inevitably become strategies of legal reasoning for statutory interpretation.<sup>58</sup> The traditional formalism approach of statutory interpretation was criticized by realists, such as Holmes and Posner, who argued that the canons and principles lack deductive reasoning, making them contradictory and unclear.<sup>59</sup> Realists consider a combination of authorities, including statutes, common-law rules, and public policies, and use practical tools in legal reasoning.<sup>60</sup> Even though modern formalism, like realism, applies public policies, economic theories, and other social norms in legal analyses,<sup>61</sup> modern judges have become more supportive of

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<sup>52</sup> Kennedy, *supra* note 51, at 1731–37.

<sup>53</sup> See, e.g., Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 8 (1998) (arguing that U.S. judges are not legislators but can be considered as rule makers and rule appliers).

<sup>54</sup> POSNER, *supra* note 19, at 106; see also Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 502–03 (1988) (arguing that realist judges seem to make law in the process of “weighing [which means counting, observing, finding]” law).

<sup>55</sup> Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 180 (1986).

<sup>56</sup> See Richard A. Posner, *Statutory Interpretation: In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 807 (1983); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 411 n.21 (1989).

<sup>57</sup> See Brian Leiter, *Legal Formalism and Legal Realism: What is the Issue?*, 16 LEGAL THEORY 111, 111 (2010).

<sup>58</sup> See generally Singer, *supra* note 54 (explaining how formalism and realism are applied in legal reasoning).

<sup>59</sup> See generally Holmes, Jr., *supra* note 3; Posner, *supra* note 55, at 196; Posner, *supra* note 56, at 808; William N. Eskridge & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

<sup>60</sup> See Jay M. Feinman, *Practical Legal Studies and Critical Legal Studies*, 87 MICH. L. REV. 724, 725 (1988). Therefore, it is difficult to clearly distinguish legal realism and legal pragmatism in some circumstances.

<sup>61</sup> See Posner, *supra* note 55, at 185. See also Singer, *supra* note 54, at 522 (arguing law and economics is “very much an exercise in formalism” because its efficiency theory strictly instructs to maximize utility).

realism than formalism because of the limitations of statutes and formalism in statutory interpretation.<sup>62</sup>

The text of a statute is ambiguous, vague, and frequently changed for policy purposes.<sup>63</sup> Inconsistency and gaps exist between statutes,<sup>64</sup> notwithstanding that statutory laws fill the gaps in common law precedents.<sup>65</sup> Even though common law statutes provide detailed definitions, applications, or exceptions and are clearer and more specific compared to the concise civil law statutes,<sup>66</sup> merely relying on the statutory language may fail to construe the legislative intent.<sup>67</sup>

Legal realism has pros and cons in statutory interpretation when fixing the problems of statutes. On one hand, the statutes can further be reformed and clarified under the influence of realistic statutory interpretation.<sup>68</sup> This is also the reason why common law systems are considered as dynamic and efficient.<sup>69</sup> On the other hand, the inefficiency of common law remains in the legal system and may not be fixed by statutes.<sup>70</sup> Some statutes are simply transformed from common-law rules (*e.g.*, Sherman Act).<sup>71</sup> These statutes can only function as ornamentation in realistic adjudication and could be read against the precedential background by courts.<sup>72</sup>

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<sup>62</sup> See Singer, *supra* note 54, at 467 (“To some extent, we are all realists now.”).

<sup>63</sup> See Leiter, *supra* note 57, at 119–20.

<sup>64</sup> Eskridge, *supra* note 4, at 1551.

<sup>65</sup> Sunstein, *supra* note 56, at 417; Tetley, *supra* note 25, at 684.

<sup>66</sup> Tetley, *supra* note 25, at 703.

<sup>67</sup> James MacCauley Landis, *Statutes and the Sources of Law*, 2 HARV. J. ON LEGIS. 7, 25–26 (1965).

<sup>68</sup> William N. Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1042 (1989).

<sup>69</sup> See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972) (arguing common law is efficient).

<sup>70</sup> See generally Wes Parsons, *The Inefficient Common Law*, 92 YALE. L.J. 862 (1983).

<sup>71</sup> A statutory law like the Sherman Act only has the structure of statutes and is a combination of common law doctrines in substance. Posner, *supra* note 56, at 808. Cf. Posner, *supra* note 55, at 197 (explaining that the Sherman Act directs courts to create common law); Archibald Cox, *Book Review: A Common Law for the Age of Statutes by Guido Calabresi*, 70 CALIF. L. REV. 1463, 1472 (1982); Tetley, *supra* note 25, at 705. The U.S. has the Uniform Law Commission to develop efficient uniform law materially based on common law rules, which can be adopted by states. See UNIFORM LAW COMMISSION, OVERVIEW, <https://www.uniformlaws.org/aboutulc/overview>.

<sup>72</sup> Posner, *supra* note 55, at 197; Posner, *supra* note 56, at 808; Cox, *supra* note 71, at 1472; Tetley, *supra* note 25, at 705.

### C. Other Legal Systems

Common law and civil law systems are modernizing by integrating the characteristics of each legal tradition. Comparatively, there are mixed, more liberal jurisdictions that derive elements from the two legal traditions.<sup>73</sup> Moreover, the world was also construed by other legal traditions, such as Muslim law, Hindu law, and ancient Chinese law.<sup>74</sup> These long-established legal traditions have modern faces, involving features of common law and civil law.<sup>75</sup> Overall, mixed jurisdictions are the prevailing trend in many countries.<sup>76</sup>

#### 1. Mixed Jurisdictions

The main difference between a civil law system and a common law system is not the form of their legal sources (*i.e.*, statutory law or case law), but rather their legal reasoning.<sup>77</sup> A legal system with codifications and statutory laws may not be recognized as a civil law system, which could be a modern common law system, such as the U.S.<sup>78</sup> A legal system without codifications could be viewed as a civil law system, such as Scotland, which is a mixed jurisdiction and codifies civil law rules in a systematic manner.<sup>79</sup> Civil law systems apply legal principles to reason instances.<sup>80</sup> The process of the application follows syllogisms, which means that civil law judges first identify the functions of the general legal principles and then determine the domain of the application of the principles in distinct cases.<sup>81</sup> Common-law judges also adopt legal principles.<sup>82</sup> Unlike civil law systems, these judges apply precedents to reason legal principles and legal rules.<sup>83</sup>

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<sup>73</sup> FREDERICK P. WALTON, *THE SCOPE AND INTERPRETATION OF THE CIVIL CODE OF LOWER CANADA* 1 (1907).

<sup>74</sup> Islamic law is a religious law, which does not necessarily equate to the present laws of Muslim countries. Even though Hindu Law and ancient Chinese law have been disintegrated, their influence on society remains. *See generally* DAVID & BRIERLEY, *supra* note 18.

<sup>75</sup> *See generally id.*

<sup>76</sup> Tetley, *supra* note 25, at 679.

<sup>77</sup> *See* Cooper, *supra* note 51, at 470–71.

<sup>78</sup> *Id.* at 472; Tetley, *supra* note 25, at 679.

<sup>79</sup> Dainow, *supra* note 24, at 424; Tetley, *supra* note 25, at 683.

<sup>80</sup> Cooper, *supra* note 51, at 471.

<sup>81</sup> *Id.*; Dainow, *supra* note 24, at 431; Tetley, *supra* note 25, at 702.

<sup>82</sup> Cox, *supra* note 71, at 1467.

<sup>83</sup> Cooper, *supra* note 51, at 471; Dainow, *supra* note 24, at 425; Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 6 (1936).

The logic to apply precedents by common-law judges, nevertheless, follows the syllogistic structure as civil law systems.<sup>84</sup> Gradually, the accumulated principles and rules evolve and dynamically affect the judicial reasoning by common-law judges.<sup>85</sup> Meanwhile, even though the philosophy of civil law principles originated from Roman law, the principles developed by borrowing some legal thoughts from judicial decisions and common law.<sup>86</sup> Gradually, a civil law system, such as Scotland, evolves into a mixed jurisdiction.<sup>87</sup>

## 2. Chinese Legal System — Foundation of the Guiding Case System

The modern Chinese law shows a framework akin to the German legal system.<sup>88</sup> Unsurprisingly, the Chinese legal system is trending toward embracing case law. The GC system is the remarkable *terminus a quo* of this trend. This institutional innovation of the GC system is, in part, inherited from Chinese history and, in part, transplanted from other legal systems. Generally, Chinese law develops by oscillating between morality and realism.

### a. Historical Perspective

Chinese law is distinguished from the civil law derived directly from Roman Law but has developed by itself as an independent legal tradition. Before the Spring and Autumn period (771 to 476 BC), the Chinese legal system mainly adopted unwritten customary laws,<sup>89</sup> rather than customs in writing, which were the sources of civil law.<sup>90</sup> It was similar to the stage when local English customs were applied as a legal source before precedents were compiled and adopted in the English legal system.<sup>91</sup>

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<sup>84</sup> Realism believes that legal reasoning is deductive logic. Posner, *supra* note 55, at 181, 184–85. The logic to apply major premises and minor premises for the decision of cases follows the syllogistic structure.

<sup>85</sup> Eskridge, *supra* note 4, at 1487; Stone, *supra* note 83, at 7.

<sup>86</sup> Cooper, *supra* note 51, at 470.

<sup>87</sup> *Id.* at 468.

<sup>88</sup> See generally Edward J. Epstein, *Tortious Liability for Defective Products in the People's Republic of China*, 2 J. CHINESE L. 285 (1988).

<sup>89</sup> “Yu Xing” adopted by Xia Dynasty (about 1900-1600 BC), was the earliest written law in China and merely used to administrate slaves. While there was written law before Spring and Autumn period, the content of the written law was limited and in secret. Jiang Guohua & Zhao Xinlei, *Matching the Case System with Chinese Characteristics and Chinese Legal Culture*, 3 JIANGNAN ACADEMIC 78, 78–79 (2018).

<sup>90</sup> JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICAN* 24 (3d ed. 2007).

<sup>91</sup> See, e.g., LAWRENCE W. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 30 (3d ed. 2005). English law has a long history between the late-13th century to the mid-19th century to establish a system of compiling precedents, which is a further improvement of its legal system from customary laws to common laws. See generally Julius Goebel, *King's Law and Local Custom*

Gradually, written statutes were used and further developed to “lü,” referring to criminal law, and “ling,” referring to administrative regulations, called “ge” and “shi.”<sup>92</sup> These various types of written statutes supplemented or complemented one another.<sup>93</sup>

When statutes were broadly applied, “li,” which referred to cases or precedents,<sup>94</sup> in principle functioned as supplements to statutes until the Ming dynasty (1368-1644).<sup>95</sup> In the Ming and Qing dynasties (1644-1912), statutory laws compiled both codes and some “lis” that were acknowledged by the central government.<sup>96</sup> During the period after the People’s Republic of China (P.R.C.) was established in 1949, and before the establishment of the GC system in 2010, the SPC compiled volumes of case reports, gradually extending from merely criminal cases to all types of cases.<sup>97</sup> These compiled cases were published internally or externally to help train judges and evaluate adjudicative inconsistency.<sup>98</sup>

In the process of this institutional development, morality—a type of social welfare—was significantly planted in the ancient Chinese law and influences the context and the enforcement of the current law.<sup>99</sup> In the early stage, when written statutes were adopted, Xun Kuang first suggested a combination of morality and penalties in the design of the legal system.<sup>100</sup> His jurist students, Li Si and Han Fei, did not agree with his philosophy of morality when they were designing the Qin rules.<sup>101</sup> However, their legal theory to strengthen the despotic power of the empire

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in *Seventeenth Century New England*, 31 COLUM. L. REV. 416 (1931); CAENEGEM, *supra* note 26; Zhou Dao-Luan, *Establishing the Case Guidance System Suiting China’s Own National Conditions*, 4 J. OF XIANGTAN U. PHIL. & SOC. SCI. 28 (2013); Yaying, *supra* note 35.

<sup>92</sup> Guohua & Xinlei, *supra* note 89, at 79.

<sup>93</sup> Ni Zhengmao, *Exploring Comparative Law*, 2 COMPARATIVE STUD. ON INSTITUTIONAL LEGAL CULTURE 217, 217 (2006).

<sup>94</sup> “Case” means “precedent” in the Chinese language.

<sup>95</sup> Guohua & Xinlei, *supra* note 89, at 79.

<sup>96</sup> *Id.* See also Cheng Hao, *The History of Chinese Precedent Laws*, 3 J. TAIYUAN NORMAL U., SOC. SCI. 63 (2018).

<sup>97</sup> These cases are not binding, and an overall system for both these cases and GCs is recognized as the case guidance system. Linfeng Wang, *The Necessity and Function of China’s GCs System*, STANFORD LAW SCHOOL: CHINA GUIDING CASE PROJECT (Oct. 15, 2013), <https://cgc.law.stanford.edu/commentaries/9-professor-wang>.

<sup>98</sup> Second Five-Year Reform for the People’s Court (promulgated by Sup. People’s Ct., Oct. 26, 2005) (China), *translated in Congressional-Executive Commission on China*, <https://www.cecc.gov/resources/legal-provisions/second-five-year-reform-program-for-the-peoples-courts-2004-2008-cecc#body-chinese> (last visited Feb. 21, 2020).

<sup>99</sup> Xu Xiangming, *About the Path of Rule of Law in China*, SOHU (Oct. 2, 2018), [http://www.sohu.com/a/257455246\\_467293](http://www.sohu.com/a/257455246_467293).

<sup>100</sup> *Id.*

<sup>101</sup> DAVID & BRIERLEY, *supra* note 18, at 446.

through stringent penalties was considered as the key reason why the Qin dynasty (221-207 BC) ended so quickly.<sup>102</sup> Later, Xun Kuang's philosophy was adopted by Dong Zhongshu, who further theorized that morality was the mainstream of law and penalties were supplemental to morality.<sup>103</sup> Dong's philosophy was inherited in the legislation in the dynasties of Han, Jin, Sui, and Tang (202 BC-907).<sup>104</sup> In those times, a world without a theory of positivism and a Hart-Fuller debate,<sup>105</sup> the legislation and the enforcement of the written statutes in China were guided by principles of morality, which stabilized the governance of the early Chinese empires and lasted many thousands of years to the present day.<sup>106</sup>

### *b. Transplant Perspective*

The civil law of China originally evolved from Japan, rather than Germany.<sup>107</sup> In the late 19th century, as the result of a series of wars, the Qing government allowed Japan, Britain, and several other countries to have consular courts and extraterritorial rights to exclusively rule their citizens and the business transactions within the particular International Settlements in China.<sup>108</sup> The application of these various legal systems inside China was a shock to the enforcement of the Qing Code.<sup>109</sup>

Later, Britain and other countries proposed to withdraw their extraterritorial rights with a condition of amending the Qing Code.<sup>110</sup> These proposals encouraged the Qing

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<sup>102</sup> *Id.* at 443; see JIANG ZHENGCHENG, CHU'S TALENT IN QIN – LI SI (2014); Feng Youlan, *The Core of the Thinking of Legalist Were Not Law, But the Methods of Empire*, IFENG.COM (Jan. 17, 2011), [http://news.ifeng.com/history/zhongguogudaishi/special/shangyang/detail\\_2011\\_01/17/4303941\\_0.shtml](http://news.ifeng.com/history/zhongguogudaishi/special/shangyang/detail_2011_01/17/4303941_0.shtml).

<sup>103</sup> Xiangming, *supra* note 99.

<sup>104</sup> *Id.*

<sup>105</sup> See generally Lon L. Fuller, *Positivism and Fidelity to Law - a Reply to Professor Hart*, 71 HARV. L. REV. 630 (1957).

<sup>106</sup> Xi Jinping, *Persisting in Combining Rule by Law and Rule by Morality in Governing the Country*, XINHUANET (Dec. 10, 2016), [http://www.xinhuanet.com/politics/2016-12/10/c\\_1120093133.htm](http://www.xinhuanet.com/politics/2016-12/10/c_1120093133.htm).

<sup>107</sup> Deng Feng, *The Law and Economics of the Reform at the End of Qing Explains Why China Learned Civil Law*, 2 PEKING U. L.J. 165, 165 (2009).

<sup>108</sup> In the Amendment of Treaty of Nanking signed after the First Opium War (enacted in 1843), Britain acquired consular jurisdiction. In Sino-Japanese Friendship and Trade Treaty (signed Sep. 13, 1871), Japan and China gave consular jurisdiction to each other. Fengxue Rong, *The Truth of Concessions*, HISTORY OF THE PEOPLE, <http://mjls.hkust.edu.hk/Book.aspx?cid=4&tid=4060> (last visited Dec. 7, 2019).

<sup>109</sup> Chen Yaping, *Renewed Treaty of Commerce and Navigation between Britain and China and Legal Reform in the late Qing*, 1 STUDIES IN QING HISTORY 58, 62 (2004).

<sup>110</sup> Feng, *supra* note 107, at 166; SU LI & HE WEIFANG, *THE TWENTIETH CENTURY OF CHINA: ACADEMIA AND SOCIETY - LAW* 103, 192, 330 & 392 (2001).



government to reform the Qing Code with legal transplants from Japan.<sup>111</sup> The Japanese system digested the institutional design and judicial intelligence from many western countries.<sup>112</sup> Its law enforcement was combined with morality, which shared the mainstream philosophy in China and distinguished it from the “violent” German legal system.<sup>113</sup>

As time went on, the civil-law theories and the codification skills from the German Civil Code (“BGB”), and the compilations of Switzerland, Brazil, Italian, etc., were further studied by the Chinese and adopted into Chinese codes, especially under the influence of the wars in the early 20th century.<sup>114</sup> In the early stage when the P.R.C. was established, David and Brierley criticized that the adoption of “Romano-Germanic codes” was only a piece of equipment for the governance of the Communist Party, and that western legal thinking was never embraced in its path of socialism.<sup>115</sup> However, this is not true anymore as the governance is stable.

“[L]aw is not an end, but a means to an end – the adequate control and protection of those interests, social and economic. . . .”<sup>116</sup> Justice Stone’s realistic rationale<sup>117</sup> was true for Qing legislators when they reformed the law for sovereignty and social stability, even though they finally did not walk on a path of common law. It is also true for many civil law systems in legal transplants or self-development, including today’s China. As their societies and economies have developed, many European countries do not persist with their civil law pedigrees and, instead, progress towards mixed legal jurisdictions with dynamic legal thinking.<sup>118</sup> This movement can also be seen in the future of the legal system of China.

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<sup>111</sup> See XU ZHUOYUN, TEN-THOUSAND YEARS HISTORY (2017); Yaping, *supra* note 109, at 60. Qing officials inspected both the common law and civil law systems in Britain, the U.S., Germany, France, Japan, and some other countries and appreciated the legal education and the jurisprudence in Japan. See Feng, *supra* note 107, at 169–72; Yaping, *supra* note 109, at 64.

<sup>112</sup> Feng, *supra* note 107, at 171.

<sup>113</sup> *Id.* at 169, 171; Yaping, *supra* note 109, at 64.

<sup>114</sup> DAVID & BRIERLEY, *supra* note 18, at 446.

<sup>115</sup> *Id.* at 231 (arguing that the Communist Party was opposed to Romano-Germanic Codes in earlier years because it was close to Marxism).

<sup>116</sup> Stone, *supra* note 83, at 20.

<sup>117</sup> See Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 228–29 (1972).

<sup>118</sup> Cooper, *supra* note 51, at 470; WALTON, *supra* note 73, at 1 (“A mixed legal system is commonly defined as a system in which the Romano-Germanic tradition has become suffused to some degree by Anglo-American law.”).

### D. The Guiding Case System

In China, the main legal source is statutory law. Besides statutes and regulations, the SPC also provides judicial interpretations, which are binding.<sup>119</sup> In 2010, to improve adjudicative consistency, the SPC established the GC system, in which the SPC establishes a Case Guidance Office to select, compile, and publish GCs.<sup>120</sup> The GCs are court decisions made by the SPC or the inferior courts.<sup>121</sup> The SPC selects GCs by referral under the standard that the cases should suggest significant social concerns or deal with typical, representative, or difficult legal issues.<sup>122</sup>

The first set of GCs was published in 2011,<sup>123</sup> and the GC system is increasingly emerging. Even though some scholars argue that the GCs should not be considered as

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<sup>119</sup> Zhōnghuá Rénmín Gònghéguó Rénmín Fǎyuàn Zǔzhī Fǎ, (中华人民共和国人民法院组织法) [Organic Law of the People's Courts of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, effective Jan. 1, 2007) 2006 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. art 33 (China). See Chenguang Wang, *Law-Making Functions of the Chinese Courts: Judicial Activism in a Country of Rapid Social Changes*, 4 FRONT. L. CHINA 524, 535 (2006) (arguing that judicial interpretations are binding).

<sup>120</sup> Zuìgāo Rénmín Fǎyuàn Guānyú Ànlì Zhǐdǎo Gōngzuò De Guiding, (最高人民法院关于案例指导工作的规定) [Provisions of the Supreme People's Court Concerning Work on Case Guidance] (promulgated by Adjudication Comm. Sup. People's Ct., Nov. 15, 2010, effective Nov. 26, 2010) June 12, 2015, art. 4 (China).

<sup>121</sup> There is much literature in English introducing how the GCs are selected and how they function. See Fengping Gao, *China's Guiding Cases System as the Instrument to Improve China's Case Guidance System, which Includes Both Guiding Cases and Typical Cases*, 45 INT'L J. LEGAL INFO. 230, 233 (2017); Jia, *supra* note 21, at 2213; Jiang Xiaoyi & Shao Ling, *The Guiding Case System in China*, 1 CHINA LEGAL SCI. 106, 117 (2013).

<sup>122</sup> According to the 2010 Guiding Case Provisions, to qualify as a guiding case two requirements must be met: (1) [T]he judgment of the case has taken into effect, and (2) the case shall have one of the following values: (a) [I]t is of great social concern; (b) [I]t involves the issue for which the legal provision is relatively general; (c) [I]t is typical; (d) it is difficult, complicated or of new type; or (e) [I]t contains other quality of guidance.

Zhang, *supra* note 11, at 285–88 (listing the detailed requirements for the selection of GCs and the factors that have been considered by the SPC before the establishment of the GCs but may affect the selection).

<sup>123</sup> Zuìgāo Rénmín Fǎyuàn Guānyú Fābù Dìyīpī Zhǐdǎoxìng Ànlì De Tōngzhī, (最高人民法院关于发布第一批指导性案例的通知) [Notice of the Supreme People's Court on Issuing the First Set of Guiding Cases] 2011 SUP. PEOPLE'S CT. GAZ. 354, (Sup. People's Ct. 2011) (China).

“common-law precedents,”<sup>124</sup> these cases are “*de facto* binding.”<sup>125</sup> Judges at any level are trained to learn the GCs.<sup>126</sup> Some GCs have been cited as legal sources by the inferior courts.<sup>127</sup> Therefore, some other scholars suggest that China cannot be simply defined as a civil law system and the GCs are a crucial tool for lawyers and scholars to understand law and law enforcement in China.<sup>128</sup> The bottom line of these various arguments among scholars is that GCs are a judicial source of law. They can be applied as judicial interpretations by courts<sup>129</sup> and can influence legislation in the future.<sup>130</sup>

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<sup>124</sup> See Jia, *supra* note 21, at 2231–34 (concluding that the GCs are more civil than common and rejecting that the GCs are “common law” precedents). *But see*, Jinting, *supra* note 21, at 2 (arguing that China has common law in reality); SU & HE, *supra* note 110, at 333 (indicating that China is looking for a balance between common law and civil law by using both the statutory law and GCs).

<sup>125</sup> Guo Feng Jr., *The Compilation and Application of China’s Guiding Cases*, STAN. L. SCHOOL CHINA GUIDING CASES PROJECT 3 (Jan. 27, 2017), <https://cgc.law.stanford.edu/commentaries/18-guo-feng/> (“[GCs] are of authoritative, normative, exemplary, and uniformly applicable nature. They are *de facto* binding.”).

<sup>126</sup> See Gao, *supra* note 122, at 235 (introducing how GCs are instructive in the mandatory training process).

<sup>127</sup> See, e.g., Chengdushi Shichang Jiandu Guanliju, Chengdu Shucuifang Shipin Youxian Gongsi Gongshang Xingzheng Guanli Zaishen Xingzheng Panjue Shu (成都市市场监督管理局、成都蜀粹坊食品有限公司工商行政管理再审查行政判决书) [Chengdu Shu Cuifang Food Co. v. Chengdu Admin. for Indus. & Commerce], (Sichuan Chengdu Intermediate People’s Ct. Nov. 15, 2017) (China) (citing N.47 Guiding Case); Yidali Feililuo Gongsi Su Tesha (zhangjiagang) Shipin Youxian Gongsi Buzhengdang Jingzheng Jiufen An (意大利费列罗公司诉蒙特莎(张家港)食品有限公司不正当竞争纠纷案) [Ferrero Int’l S.A. v. Montresor Food Co.], 2015 Sup. People’s Ct. Guiding Case 47 (Tianjin High People’s Ct. 2005) (China).

<sup>128</sup> See Jocelyn E. H. Limmer, *China’s New Common Law: Using China’s Guiding Cases to Understand How to Do Business in the People’s Republic of China*, 21 WILLAMETTE J. INT’L L. & DIS. RES. 96, 133 (2013) (emphasizing the importance of the GCs to the contract law and business plans in China); Zhiyu Li, *Innovation Through Interpretation: How Judges Make Policy in China*, 26 TUL. J. INT’L & COMP. L. 327, 371, 378 (2018) (showing that most judges in China follow the GCs and check other cases and arguing that GCs are policies made by the SPC).

<sup>129</sup> See Chenguang Wang, *Law-Making Functions of the Chinese Courts: Judicial Activism in a Country of Rapid Social Changes*, 4 FRONT. L. CHINA 524, 537–44 (2006).

<sup>130</sup> E.g., The trademark law was amended as consistent as a guiding case after the guiding case was published for five years. Wang Suiyong Su Shenzhen Gelisi Fushi Gufen Youxian Gongsi, Hangzhou Yintai Shiji Baihuo Youxian Gongsi Qinhai Shangbiaoquan Jiufen An (王碎永诉深圳歌力思服饰股份有限公司、杭州银泰世纪百货有限公司侵害商标权纠纷案) [Wang v. Ellassay Fashion Co.], 2017 Sup. People’s Ct. Guiding Case 82 (Sup. People’s Ct. 2014) (China) [hereinafter N.82 Guiding Case]; Shangbiao Fa (商标法) [Trademark Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 23, 1982, effective Mar. 1, 1983) 2019, art. 4.1, 68.4 (China).

## II. EMPIRICAL STUDY DESIGN

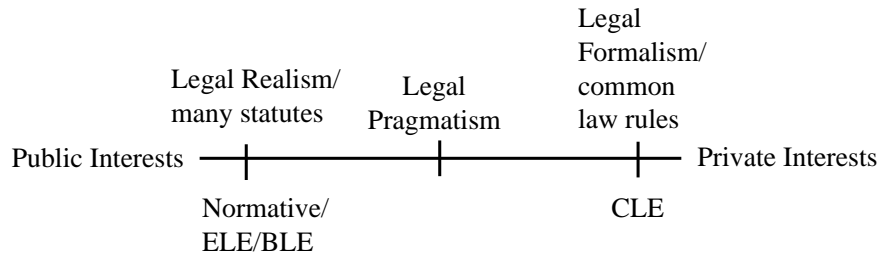


Figure 1. Public/Private Interests-Concentrated Judicial Reasoning

In contrast to the literature about GCs which is primarily doctrinal,<sup>131</sup> this Article conducts an empirical study to systematically review the GCs. After addressing whether GCs are common-law precedents in Part I, this Part employs the jurisprudential criteria for analyzing common-law cases, legal realism, formalism, and pragmatism, to design the empirical study of GCs.<sup>132</sup> This Part first establishes a spectrum, which links the public and private interests under the jurisprudential theories. Based on the spectrum, it sets up the hypotheses for this empirical research and explains why the spectrum borrows the tool of law and economics to categorize utility. Then this Part does not only apply the spectrum to code the GC system under various jurisprudential theories, but also discusses the limitations of the data and the coding strategies.

*A. Hypotheses: From Public Interests to Private Interests*

The logic of observing judicial reasoning from a perspective of public and private interests is drawn in the spectrum in Figure 1. The top of the spectrum refers to the theories behind the development of the U.S. common law and statutory interpretation. The bottom of the spectrum refers to the inclusive law and economic theories. These theories function as tools to measure various types of utility addressed in judicial reasoning and explain the association between public and private interests behind judicial reasoning.

To explore how the courts adjudicating the GCs addressed public and private interests in judicial reasoning, and how the SPC instructs inferior courts to address public and private interests, this research mainly proposes four hypotheses. First, if a court is formalistic, mechanically applying the statutes that benefit interest groups, and rules in a conventional common-law style (*i.e.*, individualism), its opinion concentrates on the rights and liabilities of the private parties and the transactions

<sup>131</sup> Peking University runs a database of law and legal documents, pkulaw.cn. It provides annual statistical reports about how GCs are applied by the courts in China.

<sup>132</sup> See Posner, *supra* note 55, at 197 (arguing that realism and formalism are used to interpret common-law cases).

between them.<sup>133</sup> Second, if a court is realistic to apply the same law and statutes that benefit the public interest, the court opinion tips more to the public interest and may even impair the interests of the disputed private parties to some extent. Third, the opinions of pragmatic courts vary between public and private interests depending on the facts and the law.<sup>134</sup> Fourth, the public interest and private interests are associated, but the association could be either positive or negative depending on the facts and the law.

### 1. Legal Formalism and Private Law

The first hypothesis is based on the dichotomy between public and private law, and how the U.S. common law system was developed from private law. Public law respects public welfare, and private law respects personal interests.<sup>135</sup> In other words, public law directly maximizes public welfare by maximizing individual utility.<sup>136</sup> Private law maximizes individual utility, but it recognizes that personal interests are not “subordinated” to the public welfare.<sup>137</sup>

The foundation of U.S. law is private law, the nature of which is the conventional common law plus the notion of common law formalists to apply the conventional common law.<sup>138</sup> The reason is that the conventional common law was built around individualism:<sup>139</sup> “I am entitled to enjoy the benefits of my efforts without an obligation to share or sacrifice them to the interests of others.”<sup>140</sup> The main body of private law, which includes property, tort, and contract law, also benefits from a

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<sup>133</sup> See Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 241, 265 (1986) (arguing that legislative statutes do not always benefit the public interest and common-law canons may aggravate how the statutes benefit particular private groups in practice).

<sup>134</sup> See Posner, *supra* note 53, at 7–8 (distinguishing pragmatists from positivists because pragmatists weight more facts than authority compared to positivists).

<sup>135</sup> See THE DIGEST OF JUSTINIAN 1, 1 §2 (Alan Watson ed., 1998), *quoted* note 1 in Alain Supiot, *The Public-Private Relation in the Context of Today's Refeudalization*, 11 INT'L J. CONST. L. 129, 129 (2013).

<sup>136</sup> See Supiot, *supra* note 135, at 131 (using the Soviet Union and Marxism as examples to interpret an extreme case of public law).

<sup>137</sup> See *id.* (introducing that private law cuts the nexus between private utility and the general good).

<sup>138</sup> William N. Eskridge & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 711 (1991) (introducing the history of law in 1890s when the mainstream ideology accepted by “elite legal society” was formalism).

<sup>139</sup> See Cooper, *supra* note 51, at 474; Kennedy, *supra* note 51, at 1685.

<sup>140</sup> Kennedy borrows the concept of “self-reliance” to explain individualism. In order to come out this explanation for individualism, Kennedy reviews the literature in history, philosophy, and politics by that time, which is included in note 74 in his paper. Kennedy, *supra* note 51, at 1713.

theoretical foundation of individualism.<sup>141</sup> Formalists practicing in the U.S. determine the common law by looking to the canons, rules, and doctrines established by courts in the various states.<sup>142</sup>

Legal formalism evolves and adjusts to modern common law<sup>143</sup> – emphasizing the importance of the logic of analyzing common-law rules and doctrines but banishes policies and principles.<sup>144</sup> Even though it gradually embraces principles, legal formalism still refers to a rigid logical deduction in legal analysis.<sup>145</sup> During its evolution, legal formalism has been widely recognized as the foundation for doctrinal analysis of law, especially common-law cases.<sup>146</sup> Due to formalism, the law is distinguished from morality and argued as science.<sup>147</sup> On the one hand, the separation

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<sup>141</sup> See *id.* at 1715 (“Individualism provides a justification for the fundamental legal institutions of criminal law, property, tort, and contract.”).

<sup>142</sup> The canons, rules, and doctrines were established for eliminating judicial inconsistency, which is a natural result of the “splintering” of English common law applied by the multiple states in America. See KARL N. LLEWELLYN, *COMMON LAW TRADITION: DECIDING APPEALS* 20 (1960), quoted in Patrick J. Kelley, *Holmes, Langdell and Formalism*, 15 *RATIO JURIS* 26, 26 (2002) (introducing the contribution of Llewellyn in legal theories and formalism and reviewing the history of common law and formalism in the 18th century and early 19th century); JOHN H. LANGBEIN ET AL., *HISTORY OF THE COMMON LAW* 874 (2009) (introducing that English common law is the origin of the U.S. common law).

<sup>143</sup> But see Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 *MICH. L. REV.* 875, 888 (1991) (arguing that formalism is diminished when the legislation triumphs over common-law cases). I do not distinguish the concepts between common law formalism, Langdell formalism, and modern legal formalism here. One reason is that Posner, who raises modern legal formalism argues, that legal formalism is a tool for analyzing common law cases and doctrines, rather than interpreting statutes. The other reason is that despite the fact that modern legal formalism is not parallel to common law formalism and Langdell formalism, Posner agrees that they are related. See Posner, *supra* note 55, at 180–81.

<sup>144</sup> Kelley, *supra* note 142, at 29–32 (anatomize the Langdell formalism by reviewing his books, lectures, and teaching philosophy in Harvard). Both of the concepts (i.e., common law formalism and conventional common law) was predominant only before the 20th century. Common law formalism was refined by Langdell. See Kennedy, *supra* note 51, at 1725–31 (introducing private law theory based on individualism was predominant between 1800s-1940s and outdated after the 1900s); Eskridge & Peller, *supra* note 139, at 711–12 (arguing that common law formalism was predominant in 1890s and outdated after the 1920s).

<sup>145</sup> See Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 *LEGAL THEORY* 457, 459 (2000) (criticizing that the formalism is not practical because of its bigotry with the concepts and principles embedded in the law).

<sup>146</sup> Holmes and Posner agree that legal formalism is the foundation for doctrinal analysis of common law cases, while they and other realists still criticize it. See Holmes, Jr., *supra* note 3, at 991–92; Kelley, *supra* note 142, at 30; Posner, *supra* note 55, at 180–81 (“Formalist can mean . . . rigorous, modest, reasoned, faithful, self-denying, restrained.”).

<sup>147</sup> Kelley argues that Langdell inherits John Austin and sets a rigid distinction between law and morality. See Kelley, *supra* note 142, at 35–40 (organizing the works and lectures done by Christopher C. Langdell, who uses the concept of formalism and first argues that law is science, between 1870 and 1887).

is opposed by normative theorists who believe that common-law judges rely on morality in adjudication.<sup>148</sup> On the other hand, it is useful to instruct the courts to apply common-law rules and doctrines<sup>149</sup> and interpret statutes.<sup>150</sup>

Formalistic legal reasoning contributes to how the law develops to benefit public and private interests beyond the dichotomy between public and private law. Realists, who oppose legal formalism, apply formalistic logic to argue the efficiency of common law and how common law and statutes maximize public and private interests.<sup>151</sup> On the one hand, formalistic logical deduction in syllogism helps realists reveal that common-law rules and legislation may merely benefit particular interest groups but fail to benefit the public welfare.<sup>152</sup> On the other hand, the root of formalism that is common law formalism is defective by common law formalism itself: Private law does not mean not to protect public interests or necessarily conflicts with public interests. The common-law rules consistent with individualism and

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<sup>148</sup> Positivism, emphasized by Hart in the middle 20th century and followed by other realists, agrees with formalism on setting a clear boundary between law and morality. *See generally* H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 594–95 (1957) (originally raising positivism to separate law and morals). *See* Richard A. Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law*, 9 HOFSTRA L. REV. 775, 776 (1981) (responding to normative scholars' concerns about morality in adjudication). *But see generally* Fuller, *supra* note 105; Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1150–53 (1999) (arguing that formalism does not connect with positivism).

<sup>149</sup> Doctrinal analysis is a critical and lasting methodology for legal studies. *See* Posner, *supra* note 55, at 190 (agreeing that the application of common law cases is conceptual deductive, even though common law cases are linear).

<sup>150</sup> Even though Posner argues that formalism and realism are only used to analyze common law cases, but he recognizes the connection between common law doctrines and statutes. In statutory law, formalism is easily understood as textualism. *See id.* at 197 (explaining that there are two categories of statutes, clear and specific or expected to be interpreted by the courts by using or developing common law doctrines); James McCauley Landis, *Statutes and the Sources of Law*, 2 HARV. J. ON LEGIS. 7, 16 (1965) (arguing that common law is a product or consequence of legislation); Sunstein, *supra* note 56, at 442 (using “formalism” and “textualism” parallelly).

<sup>151</sup> *See generally* POSNER, *supra* note 69, at 67; Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977); Posner, *supra* note 148, at 781–83; Nuno Garoupa & Carlos Gómez Ligüerre, *The Evolution of the Common Law and Efficiency*, 40 GA. J. INT'L & COMP. L. 307, 317 (2012); Singer, *supra* note 54, at 522 (“Law and economics is very much an exercise in formalism.”). *But see* Parsons, *supra* note 70 (applying economic theories to argue reckless and non-reckless common-law doctrines are economically inefficient in adjudication).

<sup>152</sup> *See* Posner, *supra* note 55, at 193–94 (arguing the impossibility that legislative's purpose of social optimum can be achieved through benefiting particular groups' interests and increasing competition). This failure can also be explained under the public choice theory: Judges and legislators, who make collective decisions, are impossible to flatly address the public welfare but redistribute the public interests to particular interest groups. *See* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 823–31 (1982) (explaining how the public choice theory based on Arrow's Theorem suggests the failure of formalistic courts' interpretation of legislation and application of precedents/common-law rules); Farber & Frickey, *supra* note 143, at 879 (introducing that both positivism and public choice theory agree on the inconsistency of the public welfare and the accumulated groups' interests).

utilitarianism remain in the law but are argued as departing from private law because individualism is not the core of the modern common law.<sup>153</sup> For instance, people believe that contracts respect “free will,” unlike state regulations, which govern transactions by employing restrictions.<sup>154</sup> In other words, people are the masters of their contractual terms, without government intervention.<sup>155</sup> This formalistic vision is impractical, and contract law is not pure private law because of the defective premises of contract law in formalism. Freedom of contract does not consider (1) the situations of “fraud, duress, or incapacity”<sup>156</sup> that are addressed by so-called morality, market efficiency, or public utility; (2) the enforcement of contract through public power;<sup>157</sup> and (3) the liberties tolerated by the government.<sup>158</sup> Moreover, the legislative obligations, function of deterrence (*e.g.*, punitive damages), and other social norm concerns in tort law haul it from pure private law.<sup>159</sup> Property law also involves public-law features when the U.S. Constitution, a public law, secures private property rights from government intervention and protects public interests.<sup>160</sup>

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<sup>153</sup> See Posner, *supra* note 148, at 776 (“Wealth maximization is closely related to utilitarianism, and the formative period of the common law as we know it today, roughly 1800-1950, was a period when utilitarianism was the dominant political ideology in England and America.”).

<sup>154</sup> The idea is originally raised by Henry Maine. See HENRY SUMMER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 304–05 (1961) (arguing the movements of society from status to contract); Singer, *supra* note 54, at 479–80 (discussing Maine’s theory of free will in contracts against regulations).

<sup>155</sup> See Singer, *supra* note 54, at 479–80.

<sup>156</sup> *Id.*

<sup>157</sup> See Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 570 (1982) (“Freedom of contract is freedom of the parties from the state as well as freedom from imposition by one another.”).

<sup>158</sup> See Singer, *supra* note 54, at 479 (“The state refuses to regulate the substantive terms of private relations.”).

<sup>159</sup> See *id.* at 480 (arguing that tort law was not treated as private law in 1859 due to the “state-imposed obligations”); Benjamin C. Zipursky, *Palsgraf, Punitive Damages, and Preemption*, 126 HARV. L. REV. 1757, 1771 (2012) (arguing that tort law shows public law characters by conducting guiding rules and the concerns about social norm and providing examples of punitive damages).

<sup>160</sup> See Macey, *supra* note 133, at 240 (explaining why Constitution Law protects public interests); Chaim Saiman, *Public Law, Private Law, and Legal Science*, in WORKING PAPER SERIES N. 56 691, 692–93 (2008) (explaining that the Constitution protects economic freedom, which is the public welfare).



## 2. Legal Realism, Statutes, and Public Interests

Realists develop modern common law further by standing on the shoulders of formalism and legislation.<sup>161</sup> Realists and formalists agree on the importance of legal doctrines, principles, and precedents,<sup>162</sup> however, realists believe that law is not neutral, but policy-driven.<sup>163</sup> The premise relied upon by normative jurists<sup>164</sup> that judges are legislators is not precise in a modern common-law system. Under legal realism, modern U.S. judges are not legislators and do not make law, but only interpret the law by following the legislature (*i.e.*, Congress), statutes, or common-law precedents.<sup>165</sup> The distinction between realists and normative jurists does not mean that realists are cruel to deny morality, but legal realism treats morality as a policy question or a legislative question. Morality, as a concern about public welfare, can be addressed by legislators or the government.

Realists may intend to improve public welfare and may prefer government intervention and other types of public power over free markets.<sup>166</sup> The first reason is that realists pursue the economic efficiency of society and market transactions,<sup>167</sup> which is also the purpose of most statutes.<sup>168</sup> The accumulation of the maximized utility of private parties in a free market does not necessarily result in a maximized

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<sup>161</sup> See Saiman, *supra* note 161, at 694 (discussing the transition from private law/common law to public law modes of legal reasoning under realism in 20th century in the U.S.); Eskridge & Frickey, *supra* note 59, at 345 (arguing that positive way to interpret statutes forms dynamic legal systems).

<sup>162</sup> Holmes is always considered as the founder of realism and positivism. While he heavily criticized Langdell, he was not in complete antithesis to Langdell, and they agreed on the importance of legal doctrines, principles, and precedents to justice and adjudication. See generally Holmes, Jr., *supra* note 3, at 991; see also Kelley, *supra* note 142, at 30, 48–50 (discussing the common characters shared by Holmes and Langdell in jurisprudence).

<sup>163</sup> See Eskridge & Peller, *supra* note 138, at 712–13 (introducing that realists in 1920s–1930s argued that law is not neutral but policy-driven).

<sup>164</sup> Fuller is a representative normative scholar, against to positivism. See Fuller, *supra* note 105, at 631 (“A rule of law is ... the command of a sovereign, a rule laid down by a judge.”).

<sup>165</sup> Jurists in recent years roughly agree that the U.S. Congress is the legislator. Judges are not legislators. They do not make law, but only interpret the law or apply the rules. See POSNER, *supra* note 19; Frank H. Easterbrook, *Statute’s Domains*, 50 U. CHI. L. REV. 533, 536–37 (1983); Stone, *supra* note 83, at 14; Posner, *supra* note 53, at 8.

<sup>166</sup> See Singer, *supra* note 54, at 482 (defining that realism counters self-regulating market systems but supports state involvement or state control). Singer argues that what is more important than the distinction between a free market and a regulatory market is who is the group protected in the market because a free market and a regulatory market can never be completely segregated. Therefore, the courts protect a free market may take market orders into consideration.

<sup>167</sup> *Id.* at 483.

<sup>168</sup> Parsons, *supra* note 70, at 885–87 (arguing that statutes and codification are more economically efficient than common law).

utility of the society but may harm the society's utility. For example, the problem of the tragedy of the commons occurs in an over-privatized system.<sup>169</sup> Freedom in commons does not bring wealth to everybody but increases transaction costs and results in inefficiency.<sup>170</sup> Therefore, the law made by legislators or enforced by courts should allocate private property rights efficiently.<sup>171</sup>

The second reason is that constitutions, which are the foundation of law, are public law. The U.S. Constitution draws the boundary between individual freedoms and government power.<sup>172</sup> This does not mean that the legal issues that cannot be solved by common-law rules or doctrines must be constitutional questions. Instead, courts should address existing public policies or the public interest when deciding such legal issues. Private-law doctrines do not consider social and political issues much, so they are constrained on many legal questions raised based on those issues.<sup>173</sup> For instance, the private parties who have difficulties filing family and privacy suits under the tort law or family law can sue for copyright infringement in the U.S., named as potential economic loss.<sup>174</sup> Here, copyright protection constitutes a particular policy concern about promoting invention and creation.

The third reason is that private rights can only be enforced through public power. A free market is self-constrained for lack of enforcement power.<sup>175</sup> Government intervention in contracts is inevitable regardless of how the contracts are endowed with free will. Therefore, realists support the proposition that government can directly intervene in private relationships or restrict people's freedom for protecting the public interest or indirectly intervene the market through its involvement in a private

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<sup>169</sup> See generally Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968); Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Market*, 111 HARV. L. REV. 621 (1998).

<sup>170</sup> See *id.*

<sup>171</sup> See, e.g., ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990) (proposing institutional control over the commons to allocate sources efficiently).

<sup>172</sup> Saiman, *supra* note 160, at 702.

<sup>173</sup> See generally *id.* at 696–703 (arguing that private law doctrines have restrictions on dealing with many questions, especially the questions having social and political considerations).

<sup>174</sup> Gilden initially explores this phenomenon and encourages the courts to clear the rules. Even though courts do not clear rules in copyright law to deal with such situations and announce that copyright law only compensates economic losses but solve such issues under copyright law in practice. See Andrew Gilden, *Copyright's Market Gibberish*, 94 WASH. L. REV. 1019, 1022 (2019).

<sup>175</sup> See, e.g., Eskridge & Peller, *supra* note 138, at 714 (discussing that strict trespass must be enforced through judicial powers). But see generally Steven B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637 (2013). Private enforcement exists and can be efficient in various circumstances depending on how the law is designed and the social costs of the law.

controller in the market, such as a monopoly party.<sup>176</sup> Overall, the second hypothesis—in brief, realistic courts are likely to address the public interest in their opinions—is deduced from these three reasons.

A strong connection between legislation and legal realism draws criticism.<sup>177</sup> Statutes do not always benefit the public interest.<sup>178</sup> First, many people disagree on the premise that legislation stands on the public interest.<sup>179</sup> When statutes benefit particular interest groups, Posner argues that the social optimum cannot be achieved through free competition between the advantaged interest groups.<sup>180</sup> Second, even though the statutes have a purpose of benefiting the public interest, they cannot avoid the problem of public choice: The statutes can be used to benefit particular individuals.<sup>181</sup> This problem has been observed as “rent-seeking.”<sup>182</sup> It is impractical that common-law courts can always follow policies to benefit the public interest and cure the problem of public choice in legislation, primarily when the statutes do not target on the public welfare.<sup>183</sup> Third, the limitations on textualism may lead to statutory interpretations benefiting private parties.<sup>184</sup> These above criticisms show that legal realism cannot draw a clear boundary between law and politics.<sup>185</sup>

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<sup>176</sup> See generally Singer, *supra* note 54 (explaining the two measures of government intervention).

<sup>177</sup> Positivism and realism rely on authority. See Posner, *supra* note 53, at 6–8 (distinguishing positivists and pragmatists by arguing that the former group relies much on authority and the latter group relies much on facts).

<sup>178</sup> See Macey, *supra* note 133, at 232–33 (introducing three categories of statutes, benefiting the public welfare, namely benefiting the public welfare but benefiting interest groups in substance, and benefiting interest groups); Posner, *supra* note 55, at 194–95 (arguing that legislature should benefit the public welfare but does not benefit in practice).

<sup>179</sup> Macey, *supra* note 133, at 240, et seq.

<sup>180</sup> See Posner, *supra* note 55, at 193.

<sup>181</sup> See Farber & Frickey, *supra* note 143, at 880 (discussing the problem of public law due to public choice under formalism); see generally Easterbrook, *supra* note 166.

<sup>182</sup> See Farber & Frickey, *supra* note 143, at 879–80. (arguing that using formalism, “contemporary republicanism,” can observe rent-seeking phenomena).

<sup>183</sup> See *id.* at 889–905 (agreeing that legislatures have stronger feelings on public values than common-law courts, even though common law principle may adopt public interests).

<sup>184</sup> See Eskridge & Frickey, *supra* note 59, at 340–44 (arguing that current values addressed in statutes can be changed or influenced by the standing of the interpreter for the limitations of linguistics).

<sup>185</sup> See Saiman, *supra* note 160, at 697–98 (arguing that legal science is the separation of law from politics).

### 3. Legal Pragmatism and Government Intervention

Government intervention becomes ubiquitous in law,<sup>186</sup> but it may not benefit the public interest as a collective action.<sup>187</sup> Pragmatists believe in the separation of law and politics.<sup>188</sup> They can tolerate the effects of different forms of law on public and private interests, which is also the third hypothesis for the empirical study.<sup>189</sup>

Pragmatism is a philosophical concept accepted by Germany and many other countries.<sup>190</sup> Before Posner distinguished legal pragmatism from philosophical pragmatism, many U.S. jurists used the term “pragmatic” to describe realism.<sup>191</sup> However, legal pragmatism and legal realism differ. On the one hand, legal pragmatism is in harmony with legal formalism by following formalism’s logical deduction to conclude in legal analysis.<sup>192</sup> Pragmatists also embrace normative considerations to some extent, addressing fairness, equality, and other moral concerns.<sup>193</sup> On the other hand, while realists and pragmatists both weigh political

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<sup>186</sup> Realists believe that state and policies intervene in all kinds of private transactions. *See* Singer, *supra* note 54, at 495 (“The market allocates and distributes power and wealth, and its mechanisms and institutional structures are created and enforced by law.”); Eskridge & Peller, *supra* note 138, at 767, et seq. (explaining that new public law rejects the distinction between private law and public law because public policies intervene in contract, torts, and property).

<sup>187</sup> *See supra* Part II.A.3.

<sup>188</sup> *See* Stanley Fish, *Almost Pragmatism: Richard Posner’s Jurisprudence*, 57 U. CHI. L. REV. 1447, 1457 (1990); *see also* Eskridge & Peller, *supra* note 138, at 769 (“The legal process thinkers of the 1950s articulated the distinction between law and politics through the mediation of substantive pluralism on the one hand, and procedural determinacy, itself heavily dependent on the objectivity of representation, on the other.”).

<sup>189</sup> Pragmatists take legal process into account in their considerations.

<sup>190</sup> *See* Posner, *supra* note 53, at 18.

<sup>191</sup> *See id.* at 3–8 (introducing the concept of legal pragmatism and distinguishing it from positivism); Singer, *supra* note 54, at 500 (arguing that realism is roughly same as pragmatism in terms of deducing rules of abstraction).

<sup>192</sup> *See* Eskridge & Peller, *supra* note 138, at 769 (“Law was both the qualitative principles of common law formalism and the quantitative policies of regulatory science. Some realms were best left to expert resolution, others to reasoned elaboration – the pragmatic weaving together of principles and policies that defined the special judicial competence – and still others to resolution by the open-ended discretion of democratic choice.”); Leiter, *supra* note 148, at 1155–58 (distinguishing legal process from positivism because legal process embraces morality for practical reasons, which is consistent with positivism).

<sup>193</sup> *See* Fish, *supra* note 188, at 1457 (arguing that pragmatism’s nature is political but named with apolitical terms, such as “fairness, equality, [and] what justice requires”); Leiter, *supra* note 148, at 1157 (arguing that the legal process theory of adjudication makes morality legitimate).

authority<sup>194</sup> and facts in legal analysis, realists weigh authority more than facts, and pragmatists weigh facts more than authorities.<sup>195</sup>

Pragmatists are not opposed to common-law rules and the neutrality of due process, but they are consistent with realists on believing that these legal concepts are big and empty.<sup>196</sup> Pragmatists inherit from realists a consideration of “actual facts, exact discourse, actual experience, [and] a rational scientific account.”<sup>197</sup> In other words, pragmatists are practical and concerned about all external factors and uncertainties.<sup>198</sup> Pragmatic judges are prudent, securing the consistency of law in the past and future, rather than merely enforcing statutes and other law from the authority as realists, or more precisely, positivists.<sup>199</sup> Posner suggests that all U.S. courts and judges should be pragmatic,<sup>200</sup> which makes the U.S. judicial system predominant over other legal systems in the world.<sup>201</sup>

#### 4. Public/Private Interests in the Premises of Law and Economics

It is not surprising that courts may start from maximizing private interests in adjudication but end with a rule concerning the interests of third parties or other public good.<sup>202</sup> It is because public and private interests are neither opposed to each other

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<sup>194</sup> Fish, *supra* note 188, at 1452 (“In this [practical reasoning] vision authority itself is rhetoricized and politicized.”).

<sup>195</sup> This argument is truer for positivists than realists, but I do not distinguish realism and positivism at this point and agree with Leiter on that “legal realists are tacit legal positivists.” See Posner, *supra* note 53, at 6–8 (comparing between positivists and pragmatists); Leiter, *supra* note 148, at 1153–55. *But see* Eskridge & Peller, *supra* note 138, at 764–65 (arguing that realism and positivism share many common characters but are not perfectly parallel).

<sup>196</sup> See STANLEY FISH, THERE’S NO SUCH THING AS FREE SPEECH AND IT’S A GOOD THING 210 (1994) (“[T]he basic realist gesture . . . dismiss[es] the myth of objectivity as it is embodied in high sounding but empty legal concepts (the rule of law, the neutrality of due process) and then replace it with the myth of the ‘actual facts’ or ‘exact discourse’ or ‘actual experience’ or a ‘rational scientific account,’ . . . .”); Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. (2003) (“[P]ragmatism is not empty and devoid of substance.”).

<sup>197</sup> See Fish, *supra* note 188, at 1459 (introducing these realists’ characters that pragmatists do not reject).

<sup>198</sup> *Id.* at 1457.

<sup>199</sup> See Posner, *supra* note 53, at 4 (arguing that pragmatic judges secure the consistency of law and consider the law in the future).

<sup>200</sup> *Id.* at 18.

<sup>201</sup> *Id.* at 19 (arguing the U.S. judicial system is better than English, Australian, and Dutch judicial systems because U.S. judges are both rule makers and rule appliers and the latter judges are more rule appliers and less pragmatic).

<sup>202</sup> See, e.g., Zipursky, *supra* note 159, at 1771 (arguing that tort law has a function of guiding social behaviors and articulates social norms); Singer, *supra* note 54, at 482–85 (arguing that U.S. courts show public law characteristics when they fill the gaps in contract terms).

nor linearly associated, which is the fourth hypothesis for this empirical study. Law and economics can be a tool to explain their associations. The public interest is the foundation of private interests, which is also the reason why the premises of conventional, behavioral, expressive, and normative law and economics share common and conflicted parts in terms of public and private interests.

The premise of conventional law and economics (“CLE”) is that people are rational and self-interested, attempting to maximize their expected utility measured by wealth or money.<sup>203</sup> Behavioral law and economists (“BLEs”) criticize this premise and argue that people sometimes are irrational and have biases.<sup>204</sup> It is impractical to assume that private parties always sue to pursue maximizing their monetary utility.<sup>205</sup> Expressive law and economists (“ELEs”) rephrase some systematic biases recognized by BLEs as plural utility that people value. The importance of morality and fairness within the scope of the public good, emphasized by normative scholars, has been systematically explored by psychologists<sup>206</sup> and can be considered as plural utility argued by ELEs. Overall, BLEs attack the rational choice theory (*i.e.*, CLE),<sup>207</sup> ELEs propose that people have plural utility,<sup>208</sup> and normative scholars stick with morality.<sup>209</sup>

The above arguments suggest that public and private interests may conflict in the short term or a single context. These conflicts are visual and intuitive to be discussed by legal scholars as gaps in or inconsistencies of the law.<sup>210</sup> Legislators and pragmatic judges also concern these conflicts as policy issues to promote legal certainties and fill the gaps in the law.<sup>211</sup> Therefore, people in law can tolerate these conflicts from a macro perspective to observe how public and private interests are addressed in judicial reasoning.

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<sup>203</sup> Even though Korobkin and Ulen categorize rational choice theory from “thin” to “thick,” these three characters are the more with the “thick” theory to describe conventional law and economics. See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1060–66 (2000) (using a spectrum from “thin” to “thick” to introduce the rational choice theory).

<sup>204</sup> See *id.* at 1083–1102 (discussing the defects of the rational choice theory due to various biases); see generally ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* (6<sup>th</sup> ed. 2016).

<sup>205</sup> See Korobkin & Ulen, *supra* note 203, at 1075–1143.

<sup>206</sup> See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

<sup>207</sup> See Korobkin & Ulen, *supra* note 203, at 1060–66 (criticizing the limitations of conventional law and economics for its defective assumptions based on rational choice theory).

<sup>208</sup> See Dan M. Kahan, *The Economics – Conventional, Behavioral, and Political – of Subsequent Remedial Measures Evidence*, in FACULTY SCHOLARSHIP SERIES 1616 (2010).

<sup>209</sup> See Francesco Parisi, *Positive, Normative and Functional Schools in Law and Economics*, 18 EUR. J.L. & ECON. 259 (2004).

<sup>210</sup> See Fish, *supra* note 188, at 1452–55 (arguing that political concerns and social concerns are datable and have conflicts).

<sup>211</sup> See *id.* at 1455 (explaining that judges should focus on personal values when social values have conflicts from Posner’s perspective).

### B. Coding Strategy

This research codes both the substance of the GCs and the format of their text. With respect to the substance of the GCs, it codes (1) the parties in the disputes; (2) the private and public interests addressed in the disputes; (3) how the ruling courts dealt with these interests; (4) the legal sources applied by the ruling courts; and (5) the logic of the legal reasoning. This Section mainly introduces the coding strategy for the substance of the GCs.

This research adopts two main measures to capture private interests. The first measure is based on the visible outcomes of the GCs, whether both the plaintiff and the defendant were better off, or at least one party was “abnormally” harmed and could not be fully compensated by the court. In a criminal case, if the defendant was punished, but received a light sentence for voluntarily entering a guilty plea, both parties, the state and the defendant, were better off. Based on Pareto Optimum and Utilitarianism,<sup>212</sup> this measure is coded as a categorical variable (“0” no parties are harmed, “1” both private parties are better off, “2” at least one party is harmed). The second measure is related to the first measure, which is whether the court showed a concern to maximize the interest of the parties in its judicial reasoning. This measure is captured by a binary variable (“0” No, “1” Yes). The relativeness of the two measures is whether the ruling court expected the visible outcome of the adjudication.

This research mainly adopts three measures to capture the public interest as binary variables (“0” No, “1” Yes). The first measure is whether there was a social concern addressed by the ruling court. A court may have concerned the influences of the case on the society, such as the power of the judiciary, the authority of law, the litigating parties’ activities, the legal issue addressed in the lawsuit, and the court opinion for such a legal issue.<sup>213</sup> The court may have also concerned state policy issues, such as state governance,<sup>214</sup> social stability,<sup>215</sup> social conflicts under state governance, moral social norms, education issues, market orders,<sup>216</sup> people’s standard of living, and the

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<sup>212</sup> Utilitarianism is considered as Pareto improvement, using the outside sources to reallocate the inside sources and maximize the wealth of the insiders. See Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 488 (1980) (“Pareto superiority is the principle that one allocation of resources is superior to another if at least one person is better off under the first allocation than under the second and no one is worse off.”).

<sup>213</sup> See, e.g., Zipursky, *supra* note 159, at 1771 (arguing that social norms and the social effects of law are public features).

<sup>214</sup> State governance is one of the judicial values or the values of law. See Scott M. Sullivan, *Judicial Deference and Democratic Values*, 53 TULSA L. REV. 363, at 364 (2017); Posner, *supra* note 55, at 199–200.

<sup>215</sup> See Fish, *supra* note 188, at 1456 (discussing the value of law on stability, which is also an institutional norm).

<sup>216</sup> See Singer, *supra* note 54, at 482–84 (arguing that encouraging market transactions is a public concern and refers to social policies); see, e.g., Saiman, *supra* note 160, at 692–93 (arguing constitutional law is public law for protecting economic freedom).

interest of the public, people, and consumers.<sup>217</sup> Normative jurists, representing conventional common-law judges, believe that law has a consequence on society, and law and judges should be responsible for considering morality.<sup>218</sup> Moral concerns are also addressed in the history of Chinese law.<sup>219</sup>

The second measure is whether a third party's interest was protected by the court regardless if a real third party was involved in the lawsuit. This measure is selected for following Zipursky's discussion about whether tort law addresses a third party's interest.<sup>220</sup> Protecting a third party's interest is against the traditional private-law perspective that concentrates on the interest of the private parties in front of a court.<sup>221</sup> It also reflects that courts may concern the public welfare when they apply common-law rules or statutes in adjudication.<sup>222</sup>

The third measure is related to the efficiency concern: Did the ruling court consider maximizing the public welfare? The accumulation of the maximized utility of the private parties could result in a maximized public welfare, or the court preferred the public welfare to the private parties' interests. Whether the public welfare can be maximized is an empirical question to be explored in the future and out of the control of the ruling court and the SPC when the ruling court decided the case and the SPC compiled the case.<sup>223</sup>

In order to measure the techniques of judicial reasoning, this research uses binary variables to measure formalistic legal reasoning. Precisely, did the court follow syllogism to apply statutes, civil-law principles, common-law rules, and judicial interpretations?<sup>224</sup> The techniques of judicial reasoning are useful for interpreting

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<sup>217</sup> See Jia, *supra* note 21, at 2213–14 (arguing that GCs reflects the judiciary that is not independent and under the political control of the Communist Party); see generally Jerome Alan Cohen, *The Chinese Communist Party and "Judicial Independence": 1949-1959*, 82 HARV. L. REV. 967 (1969) (criticizing the exclusion of judicial independence in the legal regime of China in fifty years ago); DAVID & BRIERLEY, *supra* note 18, at 446–47, 449 (arguing that the law and the judicial system were independent in form but were the tool of state governance in substance).

<sup>218</sup> The common ground of legal science shared by Langdell and Holmes, which is non-normative, makes Langdell sometimes be criticized as realism or positivism. See Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 39 (1983) (introducing that most common law judges did not agree on the non-normative part of Langdell formalism, which is the separation between morality and law, when they decided cases); Farber & Frickey, *supra* note 143, at 882 (explaining that normative theorists believe that law influences consequences, so law should be moral and take morality into account).

<sup>219</sup> See *supra* Part I.C.2.

<sup>220</sup> See generally Zipursky, *supra* note 145; Zipursky, *supra* note 159.

<sup>221</sup> Zipursky, *supra* note 159, at 1769–70; *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

<sup>222</sup> See Zipursky, *supra* note 159, at 1780–81.

<sup>223</sup> See Leiter, *supra* note 148, at 1149 (arguing that realists use social science to solve problems).

<sup>224</sup> See Posner, *supra* note 55, at 182 (distinguishing formalism from realism because formalists focus on the process and the logic of rule deduction).



precedents and statutes, and understanding the legislative intent, the legislative purpose, and the text of the law.<sup>225</sup> Therefore, formalism could be a useful tool to track the trend of how a court addresses public and private interests by applying common-law rules and private law. Common-law rules and private law, developed around private interests in history, do not necessarily result in only benefiting private interests.<sup>226</sup> Contract law, property law, and tort law have doctrines about public interests.<sup>227</sup>

If the ruling court applied statutes and civil-law principles, the research captures whether there was a specific statute dealing with the legal issue and whether the civil-law principle was expressed in statutes or judicial interpretations. If the ruling court explained a legal concept, the research measures whether the statutory language addresses this concept. Without citing any statutes, the court may have creatively interpreted the concept by common-law rules, semantic interpretations, deference to the government, or judicial interpretations published by the SPC or the Supreme People's Procuratorate ("SPP").<sup>228</sup>

Realistic and pragmatic reasoning cannot be directly observed. Instead, they can be indirectly observed by how the court treated policies, government intervention, the market, and various types of public interests, addressed in the measures of public and private interests and formalism. In modern common-law reasoning, which is a process of logical deduction from premises to conclusion, legal realism focuses on the choice of the premises, distinguished from legal formalism, which focuses on the process of the deduction.<sup>229</sup> For instance, the premise of wealth maximization in CLE is adopted by realists,<sup>230</sup> providing a fundamental chance to examine the effects of law on the society and the efficiency of law interpretation by economic and statistical analysis.<sup>231</sup>

Based on legal pragmatism, jurists propose concepts of new private law and new public law. New public law is akin to critical legal reasoning except for political concerns.<sup>232</sup> New public law rejects a division between public and private law, a completely free market without regulations, and canons in the interpretation of statutes and precedents.<sup>233</sup> Instead, it believes that statutory interpretation is dynamic and

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<sup>225</sup> But see Eskridge & Frickey, *supra* note 59 (arguing the foundationalists who consider legislative intent, purpose, and text for statutory interpretation fail without pragmatism).

<sup>226</sup> See *supra* Part II.A.1.

<sup>227</sup> See Singer, *supra* note 54, at 479, 481.

<sup>228</sup> The creativity on ruling suggests realism. See Posner, *supra* note 55, at 182 (arguing that realists focus on the choice of rule deduction, rather than the process or the logic).

<sup>229</sup> See *id.* (distinguishing realism from formalism in legal reasonings of common law).

<sup>230</sup> See *id.* at 185–86.

<sup>231</sup> See Fish, *supra* note 188, at 1459 (explaining that realists rely on “strong empiricism of the social sciences”).

<sup>232</sup> See Eskridge & Peller, *supra* note 138, at 780 (comparing new public law and critical legal studies).

<sup>233</sup> See *id.* at 776–78 (introducing these three creativities made by new public law).

concerns social norms.<sup>234</sup> By contrast, new private law is akin to practical legal reasoning.<sup>235</sup> Practical legal reasoning judges and scholars are conventional but skeptical and practical, distinguished from critical legal reasoning judges.<sup>236</sup> According to this conventional rationale, for instance, tort law addresses concerns about punishment, deterrence, or other public interests, but is still argued as new private law because the fundamental relationships and rights dealt by torts are privately concentrated.<sup>237</sup> The conflicts of the ideologies of new public and private laws also suggest that the taxonomies of public and private laws are not as important as the measures with respect to public and private interests.

### C. Limitations of the Methodology

There are limitations caused by the data of GCs. First, the GCs are biased because they were selected by the SPC. Therefore, they cannot represent the overall judicial reasoning in China. However, they can suggest the future of judicial reasoning in China, guided by the SPC. Second, the length of the data, seven years (from 2011-2019), is much shorter than other common-law countries that have applied precedents for hundreds of years. However, it is not a limitation in this research, but rather a broad limitation for all empirical legal studies about precedents. Precedents are not equivalent to common law. A court that does not cite any precedents could apply common-law rules because the GCs suggest that Chinese courts had applied common-law rules in statutory interpretation before the GC system was established in 2010. Moreover, it is not clear how common law evolves when courts cite precedents.<sup>238</sup>

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<sup>234</sup> See *id.* at 780 (arguing that the differences between critical legal studies and new public law are political and cultural).

<sup>235</sup> “Practical” refers to “prevailing practical ideology” but is distinguished from politics because practical legal reasoning uses neutral terms and images. See Feinman, *supra* note 60, at 227–28 (connecting practical legal reasoning and political concerns).

<sup>236</sup> See *id.* at 726 n. 8, 728 (arguing that practical legal reasoning scholars rely on convention and practical legal reasoning judges are skeptical. If a judge is neither practical nor conventional, he or she is radical and critical).

<sup>237</sup> See generally John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640 (2012) (applying pragmatic theories to argue tort law is more akin to private law rather than public law); see also Zipursky, *supra* note 145, at 459–61 (applying formalism to argue that tort law needs concepts and principles, which is more akin to private law to compensate plaintiffs); Zipursky, *supra* note 159, at 1777–78 (discussing civil recourse theory and corrective justice theory that support courts to decrease transaction costs between private parties and compensate plaintiffs). But see WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 9–13 (1987) (arguing that tort law functions to deter harms).

<sup>238</sup> See Ryan Whalen et al., *Common Law Evolution and Judicial Impact in the Age of Information*, 9 ELON L. REV. 115, 118 (2017) (“Despite its centrality to the common law process, we know very little about precedent citation practices and how they relate to the development of the common law.”); see also Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin’s Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1156 (2005) (“Precedent is one of the most important areas of legal research, but currently there is no

Even though Whalen *et al.* applied precedential data from three countries which are more experienced in applying precedents than China (*i.e.*, the U.S., Canada, and India), they did not find any empirical evidence of an association between common law and precedents.<sup>239</sup>

The coding strategy also has limitations. The categorization of policy is relatively rough compared to the categorization used by Landes and Posner in their empirical study for the U.S. precedents.<sup>240</sup> The subject matters in their categorization relied on the categorization of the Harvard Law Review, which has carefully categorized SCOTUS cases since 1930. Different from the cases adjudicated in the U.S., some of which mainly relied on statutes and some of which mainly relied on common law, all the GCs have a section of “Related Legal Rule(s),” listing the relevant statutes. Even though the ruling courts may cite and apply common-law rules or civil-law principles, rather than specific statutes, there is no academic or political authority like the Harvard Law Review to conduct a normative categorization for cases in China or the GCs. In order to avoid controversial arguments on some normative questions, this research adopts a broad categorization on whether state policy backed the litigation, and how the government intervened in the litigation either as a party or by giving expert testimony, an administrative decision, or statutory interpretations. For example, it is arguable that a trademark infringement is a tort issue or an issue of economic regulations.<sup>241</sup> This research categorizes it as a tort issue but is backed with an implied policy concern and involves a government intervention, in which the government granted a trademark.

### III. JUDICIAL REASONING IN THE GUIDING CASES

This Part deploys descriptive statistics and logistic regressions to understand the GCs in China. It deploys formalistic evidence to observe whether the GCs show judicial concerns about protecting or maximizing public or private interests. While traditional and modern formalism includes many factors to be measured, this Section only responds to the deficiencies of the distinction between civil and common law discussed in Part I. Then this Part tests the hypotheses in Part II by logistic regressions. It explores whether public and private interests are consistent with or opposed to each other, and how their boundaries are affected by government intervention. Based on these empirical analyses, this Part also compares the characteristics of the GCs with

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dominant working theory, and only limited empirical evidence, about its role in judicial decision-making.”).

<sup>239</sup> See Whalen *et al.*, *supra* note 238, at 167.

<sup>240</sup> See Landes & Posner, *supra* note 10, at 252–53. Landes and Posner categorized the subject matters of the precedents decided by the U.S. Supreme Court and the U.S. Courts of Appeals in common law, economic regulation (e.g., tax, antitrust, labor, other federal regulation agencies, and patents), civil rights, constitutional, bankruptcy, military, land condemnation, criminal cases (including post-conviction proceedings), and criminal cases (excluding post-conviction proceedings).

<sup>241</sup> See Stacy L. Dogan & Mark A. Lemley, *A Search-Costs Theory of Limiting Doctrines in Trademark Law*, 97 TRADEMARK REPORTER 1223, 1223–24 (2007) (introducing that trademark law has functions to reduce research costs for consumers, protect market orders, and promote competition).

U.S. court decisions, especially SCOTUS's decisions. It also discusses the implications about what institutional strategies of legal reasoning the SPC uses to guide statutory interpretation and judicial reasoning in China.

### A. Descriptive Statistics

This Section conducts descriptive statistics of the characteristics of the GCs. The statistics of the text of the GCs are an overview for the readers who are not familiar with how the SPC compiles judicial documents and how Chinese judges write opinions.<sup>242</sup> There are also statistics for the categories of problems that the courts dealt with in the GCs. For example, some GCs respond to procedural questions, and some respond to substantive-law questions. In the GCs, some courts solved a legal question, and some courts provided a creative method to explore the facts or the evidence. The SPC selects GCs with an expectation that GCs can solve those problems and instruct future adjudication.<sup>243</sup> This Section deploys statistical data to present how public or private interests were addressed by the courts as the SPC expects.

#### 1. Formalistic Characteristics of the Text, Rules, Legal Sources, and Legal Issues

A GC consists of six main sections of "Keywords," "Main Points of the Adjudication," "Related Legal Rule(s)," "Basic Facts of the Case," "Results of the Adjudication," "Reasons for the Adjudication," compiled by the SPC based on the court opinion.<sup>244</sup> "Related Legal Rules" list relevant legislative statutes that the SPC expects to interpret by the case and "Main Points of the Adjudication" can be treated as common-law rules made by the ruling court and the SPC.

With respect to the six main sections, the summary statistics in Table 1 present the textual structure of the GCs. In a GC, the SPC on average cites 1.31 statutory laws and refines 4.41 keywords and 1.52 court rules. The civil GCs are much longer than criminal or administrative GCs. The longest part of an average GC is "Reasons for the Adjudication," explaining how the court analyzed the case to reach the outcome and the rules. The average length of the "Basic Facts of the Case" is 913.77 Chinese characters, not much shorter than the reasoning part. The GC with the shortest "Basic Facts of the Case" only includes 130 Chinese characters because the facts are simple and uncontroversial.

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<sup>242</sup> See Eskridge & Frickey, *supra* note 59, at 325 (introducing that legal foundationalists analyze law by legislative intent, purpose, and text of the law but criticizing the limitations of these characteristics in statutory interpretation).

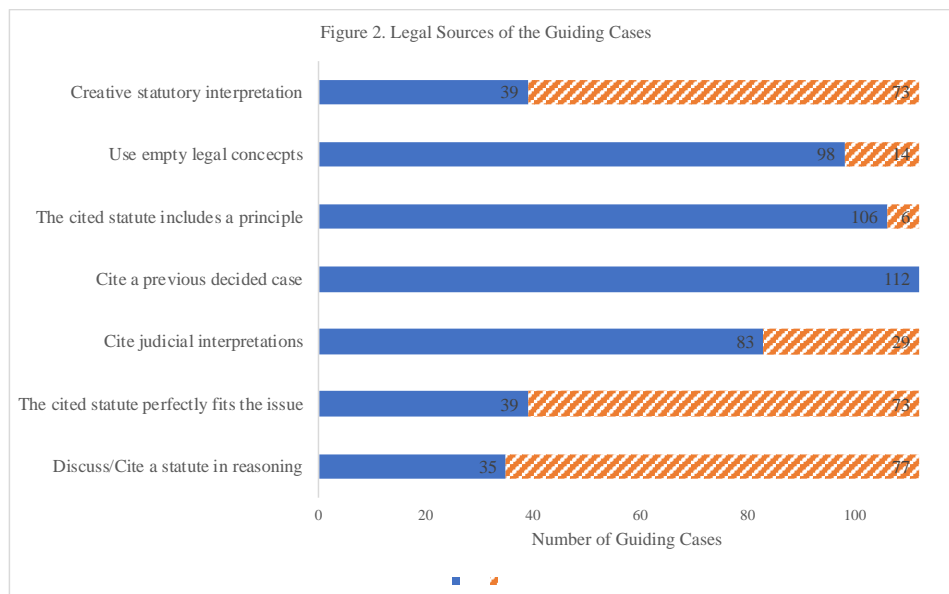
<sup>243</sup> The standards for selecting GCs are: "(1) the subject matter is of broad concern to the public; (2) the relevant legislation provides only general principles; (3) it is of a typical nature; (4) the case is difficult, complicated or new; and (5) other cases have a guiding effect." Xiaoyi & Ling, *supra* note 121, at 117.

<sup>244</sup> Gao, *supra* note 121, at 235 (introducing the six sections and their functions).

Table 1. Summary Statistics of the Guiding Case Structure

Variable	Obs.	Mean	Std. Dev.	Min	Max
#“Keywords”	112	4.41	0.95	3	7
#words	112	2718.77	1449.84	809	9018
# “Main Points of the Adjudication”	112	1.52	0.78	1	4
#“Related Legal Rule(s)”	112	1.31	0.59	1	4
#words of the “Main Points of the Adjudication”	112	155.56	72.51	48	500
#words of “Basic Facts of the Case”	112	913.77	580.27	130	3930
#words of the “Results of the Adjudication”	112	242.38	176.59	42	1523
#words of “Reasons for the Adjudication”	112	1302.45	945.85	217	5110

With respect to “Main Points of the Adjudication,” only 71.43% of the GCs (80/112) suggest common-law rules for later courts to follow. The rules in 65% of them (52/80) were deduced from abstract and the other twenty-eight GCs were deduced from facts.<sup>245</sup> The “Main Points of the Adjudication” in the remaining thirty-two GCs are either too specific to be replicated or merely repeat the statutes, even though the courts in 90.63% of these cases (29/32) had a step to separate judicial values from facts in their reasoning.



See Grey, *supra* note 218, at 15 (arguing that abstract legal principles are the characteristics of law under formalism); Posner, *supra* note 55, at 182 (distinguishing realism from formalism based on the different logic of legal deduction between the two rationales).

Although GCs include a “Related Legal Rule(s)” section, not all GCs actually discuss or even cite a legislative statute in their reasoning. Figure 2 shows the legal source that the courts of the GCs relied upon in adjudication. 31.25% of the GCs (35/112) do not cite any legislative statutes in their reasoning. This does not suggest that the ruling courts did not rely on civil-law principles at all. The relevant statutes of two of those thirty-five GCs express civil-law principles (*i.e.*, the principle of good faith).<sup>246</sup> Even though the ruling courts of the two GCs did not discuss the statutory language in their reasoning, they followed the civil-law principles. Among the GCs that cite a legislative statute, the relevant statutes of four GCs express civil-law principles, which the ruling courts followed in their adjudication.<sup>247</sup> Moreover, the

<sup>246</sup> Both GCs deal with trademark infringements and involve the same principle, “the principle of good faith.” Chengdu Tongde Fuhechuan Taopian Youxiangongsi Su Chongqingshi Hechuanqu Tongdefu Taopian Youxian Gongsi, Yuxiaohua Qin Hai Shangbiaoquan Ji Buzhengdang Jingzheng Jiufenan (成都同德福合川桃片有限公司诉重庆市合川区同德福桃片有限公司、余晓华侵害商标权及不正当竞争纠纷案) [Chengdu Tongdefu Hechuan Peach Slices Co. v. Chongqing Hechuan Tongdefu Peach Slices Co.], 2016 Sup. People’s Ct. Guiding Case 58 (Chongqing High People’s Ct. 2013) (China) [hereinafter N.58 Guiding Case]; N.82 Guiding Case.

<sup>247</sup> Precisely, these civil-law principles are (1) “voluntariness, equality, fairness, honesty, and credibility,” (2) “good faith,” and (3) “fundamental principle[s] for application of law where priority should be given to a special law.” Lan Jianjun, Hangzhou Xiaomuzhi Qiche Weixiu Keji Gufen Youxian Gongsi Su Tianjinshi Xiaomuzhi Qiche Weixiu Fuwu Youxian Gongsi Deng Qin Hai Shangbiao Ji Buzhengdang Jingzheng Jiufen An (兰建军、杭州小拇指汽车维修科技股份有限公司诉天津市小拇指汽车维修服务有限公司等侵害商标权及不正当竞争纠纷案) [Lan v. SUREMOOV Auto Maint. & Repair Serv. Co., Ltd. et al.], 2014 Sup. People’s Ct. Guiding Case 30 (Tianjin High People’s Ct. 2013) (China) [hereinafter N.30 Guiding Case] (addressing “principles of voluntariness, equality, fairness, honesty, and credibility” in Art. 2 of the Anti-Unfair Competition Law); Beijing Baidu Wangxun Keji Youxian Gongsi Su Qingdao Aoshang Wangluo Jishu Youxian Gongsi Deng Buzhengdang Jingzheng Jiufen An (北京百度网讯科技有限公司诉青岛奥商网络技术有限公司等不正当竞争纠纷案) [Baidu Netcom Sci. and Tech. Co., Ltd. v. Qsun Network Technique Co., Ltd.], 2015 Sup. People’s Ct. Guiding Case 45 (Shandong High People’s Ct. 2010) (China) [hereinafter N.45 Guiding Case] (addressing “principles of voluntariness, equality, fairness, and good faith” in Art. 2 of Anti-Unfair Competition Law); Liu Chaojiu Su Zhongguo Yindong Tongxin Jituan Jiangsu Youxian gongsi Xuzhou Fengongsi Dianxin Fuwu Hetong Jiufen An (刘超捷诉中国移动通信集团江苏有限公司徐州分公司电信服务合同纠纷案) [Liu v. Xuzhou Branch of China Mobile Grp. Jiangsu Co.], 2016 Sup. People’s Ct. Guiding Case 64 (Jiangsu Quanshan District People’s Ct. 2011) (China) [hereinafter N.64 Guiding Case] (addressing “principles of fairness and good faith”); Zhejiang Longda Buxiugang Youxian Gongsi Su A.P. Mule-Mashiji Youxian Gongsi Haishang Huowu Yunshu Hetong Jiufen An (浙江隆达不锈钢有限公司诉A.P.穆勒-马士基有限公司海上货物运输合同纠纷案) [Longda Stainless Steel Co. v. A.P. Moller-Maersk A/S], 2019 Sup. People’s Ct. Guiding Case 108 (Sup. People’s Ct. 2017) (China) [hereinafter N.108 Guiding Case] (addressing the principle of fairness in as prescribed in Art. 5 of the Contract Law and the “fundamental principle for application of law where priority should be given to a special law”); Fan Bu Zhengdang Jingzheng Fa (反不正当竞争法) [Anti-Unfair Competition Law] (promulgated by

courts in 25.89% of the GCs (29/112) applied judicial interpretations. Among these GCs, four cited judicial interpretations include legal principles.<sup>248</sup> Besides the legal principles shown in the language of legislative statutes or judicial interpretations, the judicial reasoning in twenty-three GCs applied the legal principles absent in the language of legislative statutes or judicial interpretations. In six of those twenty-nine GCs (20.69%) that cite judicial interpretations, the courts preempted a government interpretation of law. The courts preempted a government decision in three of the twenty-nine GCs (10.34%) but deferred to a government decision in six GCs (20.69%).

The courts in 12.5% of the GCs (14/112) reasoned based on an empty legal concept: Eleven GCs were reasoned based on “the rule of law” and four GCs were reasoned based on “the neutrality of due process.”<sup>249</sup> 61.18% of the GCs (73/112) show creative statutory interpretation – adopting common-law rules, civil-law principles not shown in the language of the statutes, or judicial interpretations, other than merely relying on the plain language of the legislative statutes.<sup>250</sup> However, none of the 112 GCs show that the courts expressly relied on any previous court opinions to adjudicate.

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the Standing Comm. Nat’l People’s Cong., Sep. 2, 1993, effective Jan. 1, 2018) art. 2 (China); Hetong Fa (合同法) [Contract Law] (promulgated by the Nat’l People’s Cong., Mar. 15, 1999, effective Oct. 1, 1999) art. 5 (China).

<sup>248</sup> There is one guiding case in overlap, citing statutes that include a legal principle and judicial interpretations that also include a legal principle.

<sup>249</sup> FISH, *supra* note 196, at 210.

<sup>250</sup> See Smith, *supra* note 10, at 102 (suggesting considering the importance of creativity of jurisprudence and the interaction of various legal sources and legal theories in judicial reasoning).

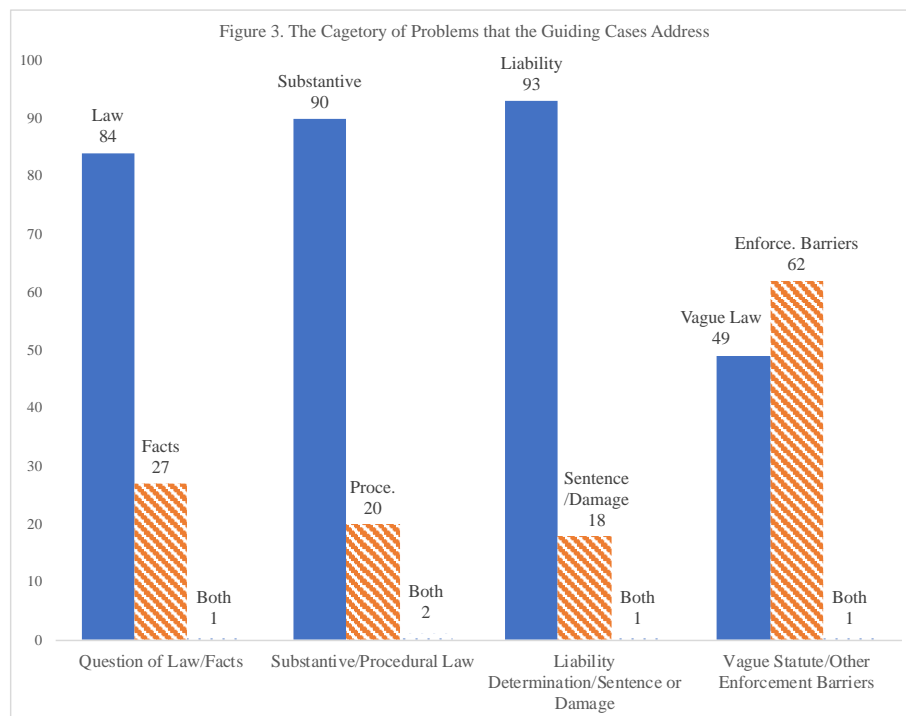


Figure 3 presents the legal issues of the GCs. 75.89% of the total GCs (85/112) function to solve a question of law by (1) interpreting statutes; (2) applying multiple statutes and judicial interpretations to solve a question which the law does not give a direct answer; or (3) clarifying the scope of rights and liabilities in social activities. 25% (28/112) function to solve a question of facts by (1) exploring the truth of the facts behind the parties; and (2) explaining how various testimonies assist the process of fact exploration.<sup>251</sup> 82.14% (92/112) deal with substantive law issues and 19.64% (22/112) deal with procedural issues.<sup>252</sup>

Figure 3 also reflects the problems existing in the Chinese legal regime and how the SPC adopts the GCs to instruct the inferior courts in the future. 44.64% of the disputes (50/112) were raised because the statutory law is vague – these GCs fill the gaps in statutory law and instruct courts in statutory interpretation. By contrast, 56.25% (63/112) show difficulties in enforcing the law besides vague statutes. These GCs show the SPC's resolution to enforce the law in particular areas, such as the enforcement of intellectual property ("IP") rights.<sup>253</sup> 83.93% (94/112) define the

<sup>251</sup> There is one guiding case in overlap, equally solving the questions of facts and law.

<sup>252</sup> There are two GCs in overlap, taking care of both the issues of substantive law and procedure.

<sup>253</sup> The court enforced trademark rights in Guiding Case 87. *See, e.g.*, Guo Mingsheng, Guo Mingfeng, Sun Shubiao/Jiamao Zhuze Shangbiao An (郭明升、郭明锋、孙淑标假冒注册商标案) [In re Guo Mingsheng, Guo Mingfeng, Sun Shubiao Counterfeiting Registered



scope of rights and liabilities, and determine the legitimacy of activities of the government and private parties. 16.96% (19/112) mainly function to instruct how courts can calculate damages or sentence the wrongdoers. The text of the latter GCs, on average, is shorter than the former GCs in a statistically significant degree. However, more words were written by the ruling courts and compiled by the SPC in the latter GCs to explain the facts and deliver the results and the reasoning.<sup>254</sup>

## 2. Public Interest Considerations

Table 2 shows the statistics for the variables representing public interests. 84.82% have a goal or possibility of maximizing the social welfare. In 30.36%, the courts and the SPC attempted to construct a free market. 41.07% show a moral concern addressed by the courts and the SPC.

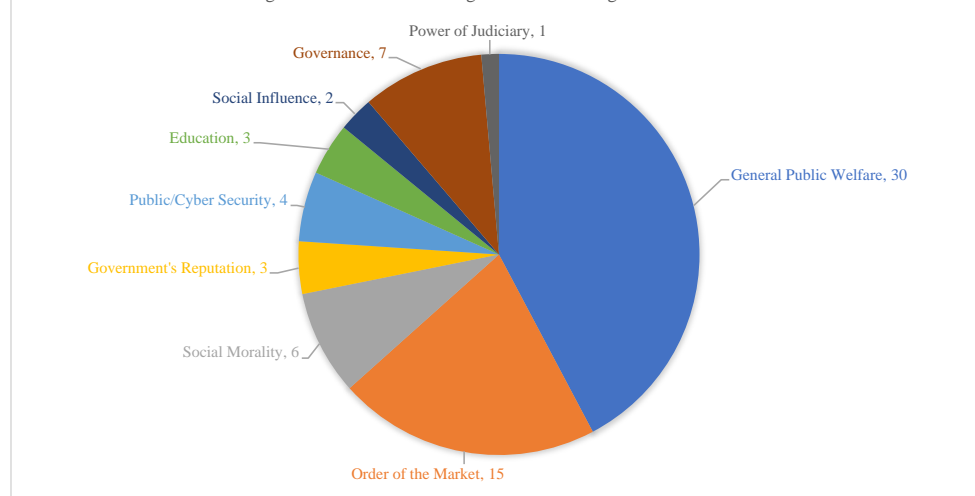
Table 2. The Number of GCs that Concern the Public Interest				
Variables/Category of the GCs	<i>Criminal</i>	<i>Civil</i>	<i>Administrative</i>	<i>Total</i>
<i>1. 3rd Parties' Interests Concerned by Law</i>				
N/A	2	22	16	40
No	6	26	2	34
Yes	14	19	5	38
Per. of Y.	63.64%	28.36%	21.74%	33.93%
<i>2. 3rd Parties' Interests Concerned by Courts</i>				
N/A	2	22	16	40
No	0	15	1	16
Yes	20	30	6	56
Per. of Y.	90.91%	44.78%	26.09%	50.00%
<i>3. Maximized the Social Welfare</i>				
No	1	11	5	17
Yes	21	56	18	95
Per. of Y.	95.45%	83.58%	78.26%	84.82%
<i>4. Social Concerns Included</i>				
No	0	32	9	41
Yes	22	35	14	71
Per. of Y.	100.00%	52.24%	60.87%	63.39%
<i>5. Policy Backed</i>				
No	19	33	19	71
Yes	3	34	4	41

Trademarks] 2017 Sup. People's Ct. Guiding Case 87 (Jiangsu Suqian Intermediate People's Ct. 2015) (China) [hereinafter N.87 Guiding Case].

<sup>254</sup> In a logistic regression having a binary dependent variable for whether the guiding case answers a question of scope of liability or rights or instructs sentencing or damage calculations, the independent variables of the length of a GC, the number of words in "Basic Facts of the Case," "Results of the Adjudication," and "Reasons for the Adjudication" show statistically significant results at a 90% level. This result does not change if the logistic regression adds the number of paragraphs of "Main Points of the Adjudication" because this control variable does not show a statistically significant association with the dependent variable.

Per. of Y.	13.64%	50.75%	17.39%	36.61%
6. Probable Deterrence				
No	3	63	22	88
Yes	19	4	1	24
Per. of Y.	86.36%	5.97%	4.35%	21.43%
7. Punitive Damages Assigned by Courts				
No	22	60	23	89
Yes	0	7	0	23
Per. of Y.	0.00%	10.45%	0.00%	20.54%
8. Fines Imposed by Courts				
No	10	65	23	98
Yes	12	2	0	14
Per. of Y.	54.55%	2.99%	0.00%	12.50%
9. Free Market Protected by Courts				
No	15	43	20	78
Yes	7	24	3	34
Per. of Y.	31.82%	35.82%	13.04%	30.36%
10. Morality Concerned by Courts				
No	4	42	20	66
Yes	18	25	3	46
Per. of Y.	81.82%	37.31%	13.04%	41.07%
Total	22	67	23	112

Figure 4. Number of Guiding Cases Addressing Social Concerns



In 63.39% (71/112), the ruling courts expressed their concerns about the society or the community, or there were implicit social concerns addressed in the GCs when they were selected and published by the SPC. The social concerns addressed by the courts in adjudication include but are not limited to (1) morality; (2) social atmosphere; (3) community perceptions; (4) art and culture; (5) a correction of a status quo bias; and (6) the business culture that has not been prevalent and has become social norms. The categories of the social concerns addressed by the GCs are shown

in Figure 4. Among the seventy-one GCs, thirty suggest that the courts and the SPC concerned the general public welfare, which was expressly or implicitly explained by the courts as (1) the public interest; (2) the shared wealth of the public; (3) food safety; (4) the benefits of consumers; (5) demands of the residents; (6) compensation for the damages of the public; and (7) dangers to the society. Four GCs particularly deal with public security or cybersecurity. Courts in fifteen GCs concerned market orders. One GC emphasizes the power of the judiciary, and the outcomes of two GCs may attract public attention and result in social influence. Seven GCs concern state governance, and three GCs facilitate to construct the government's reputation. The SPC also selected three GCs to address educational considerations. In another eight GCs, even though the ruling courts did not discuss social concerns in their adjudication, they followed social norms.

Moreover, there are forty-one GCs supported by government policies or regulations functioning to support government policies. For example, twenty-two address IP issues under the policies from the central government to strengthen IP protection and promote innovation.<sup>255</sup> The SPC published four maritime GCs in 2019 after the SPC established the International Business Courtrooms in 2018 under the "One Belt One Road" policy.<sup>256</sup> These policies show an intent to promote the public welfare, however, whether these policies can benefit the public is both an empirical question and a controversial normative question to be further explored.

Even though these policies may influence how the SPC selects GCs, the current GCs do not necessarily suggest that the ruling courts which concerned the public interest and society always adjudicated as consistent as the policies. There are twenty GCs that include a relevant policy but do not show any social concerns of the courts. In thirty-six GCs, courts expressed social concerns, but no policies related to the embedded legal issues. Moreover, legislative supremacy shows in three GCs, in which there were relevant government policies, but their reasoning applied statutes rather than strictly followed the policies.

With respect to the considerations of a third party's interest, in each category of the cases (*i.e.*, criminal, civil, and administrative), the courts concerned the public interest in a higher degree compared to the law. In the sixty-seven civil GCs, even though the law addressed in 28.36% (19/67) does not protect a third party's interest, the courts in 44.78% (30/67) protected a third party's interest. In the twenty-two criminal GCs, victims were represented by the state, but there are only 63.64% (14/67) adopting a law that repairs victims or punishes the wrongdoers. In contrast, the courts in 90.91% of the criminal GCs (20/67) had a concern to protect victims or respected a victim's concern in their adjudication.

Besides the potential effect of the GCs on the judicial system, the SPC may have an intention to deter crimes and breaches of liabilities created by law or contract. In seven civil GCs, courts assigned punitive damages to the plaintiffs. In 86.36% of the criminal GCs (19/22), courts assigned a felony. In two civil and twelve criminal GCs,

<sup>255</sup> See, *e.g.*, Outline of the Eighth-Five-Year Plan for the National Economic and Social Development of the People's Republic of China (promulgated by the 1991 Nat'l People's Cong.) (China).

<sup>256</sup> Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road (Issued by the Nat'l Dev. and Reform Comm'n, Ministry of Foreign Aff., and Ministry of Com.) Mar. 28, 2015 (China).

courts imposed a fine. Besides the twelve criminal GCs, there are three other criminal GCs in which courts imposed both a fine and a felony on the defendants. If fines, punitive damages, and a felony sentence can result in a deterrence effect,<sup>257</sup> 20.54% of the total GCs (23/112) suggest a deterrence function of the GCs. There is one criminal GC in which the court imposed a fine, but may not result in a deterrence effect because the amount of the fine was less than the illegal profits the defendants received from selling counterfeit products.<sup>258</sup>

### 3. Private Interest Considerations

Table 3 shows the variables related to private interests. In 65.18% of the GCs (73/112), courts considered the interests of the litigating parties and attempted to maximize their utility in economic wealth, freedom, or reputation. Courts considered maximizing the interest or utility of the litigating parties the most in the civil GCs and the least in the administrative GCs. The considerations of these courts did not necessarily result in an efficient outcome – at least one party was better off after the adjudication.<sup>259</sup> Some criminal defendants were better off due to the avoidance of the imposition of the death penalty or plead guilty in exchange for a shorter term of imprisonment. Some criminal defendants were sentenced to pay a fine at a higher amount than their illegal profits. The economic utility of these defendants was “abnormally” harmed after the adjudication. Similarly, the defendants in some civil or administrative GCs were “abnormally” harmed when they were sentenced to pay punitive damages or a fine by the courts, in addition to compensatory damages. Plaintiffs may also suffer “abnormal” harm if the courts did not entitle them to full compensation for their losses on money or reputation. Courts in 65.18% of the GCs (73/112) tried to maximize the utility of the parties, but in 43.75% (49/112), at least one litigating party was “abnormally” harmed after the adjudication.

Table 3. The Number of GCs that Concern the Private Interest

Variables/Category of the GCs	<i>Criminal</i>	<i>Civil</i>	<i>Administrative</i>	<i>Total</i>
1. <i>Maximized the Parties' Interest</i>				
No	8	18	13	39
Yes	14	49	10	73
Per. of Y.	63.64%	73.13%	43.48%	65.18%
2. <i>Utility Variation after Adjudication</i>				
Both are better off	8	7	0	15

<sup>257</sup> See Michael S. Moore, *A Taxonomy of Purposes of Punishment*, in THE FOUNDATIONS OF CRIMINAL LAW 64, 60–63 (Leo Katz et al. ed., 1999) (discussing how deterrence effects works in the criminal law mechanism).

<sup>258</sup> See N.87 Guiding Case. In Guiding Case 27, one of the defendants was an accomplice and imposed a fine, which is less than his or her illegal profits from fraud. A fine higher than the illegal profits was imposed on the other two defendants Zang Jinquan Deng Daoqie, Zhapian An (臧进泉等盗窃、诈骗案) [In re Zang Jinquan et al. Theft and Fraud], 2014 Sup. People's Ct. Guiding Case 27 (Zhejiang High People's Ct. 2011) (China) [hereinafter N.27 Guiding Case].

<sup>259</sup> See generally Posner, *supra* note 212.

Per.	36.36%	10.45%	0.00%	13.39%
No “abnormally” harmed party	2	31	15	48
Per.	9.09%	46.27%	65.22%	42.86%
At least one party is “abnormally” harmed	12	29	8	49
Per.	54.55%	43.28%	34.78%	43.75%
<i>3. Concerned to Make the P. Whole</i>				
No	17	48	19	84
Yes	5	19	4	28
Per. of Y.	22.73%	28.36%	17.39%	25.00%
<i>4. Concerned the Extent of Injuries Caused by D.</i>				
No	10	44	18	72
Yes	12	23	5	40
Per. of Y.	54.55%	34.33%	21.74%	35.71%
<i>5. Make the P. Whole</i>				
No	19	45	15	79
Yes	3	22	8	33
Per. of Y.	13.64%	32.84%	34.78%	29.46%
<i>6. Gave Compensatory Damages</i>				
No	16	41	21	78
Yes	6	26	2	34
Per. of Y.	27.27%	38.81%	8.70%	30.36%
Total	22	67	23	112

35.71% (40/112) discuss the extent of the injuries suffered by the plaintiffs and caused by the defendants in either the facts (*i.e.*, “Basic Facts of the Case”) or the reasoning (*i.e.*, “Reasons for the Adjudication”). 25% (28/112) suggest the intent of the courts to make the plaintiffs whole in the expression of their written opinions, and 29.46% (33/112) made the plaintiffs whole in the outcome of the litigation. When a court made the plaintiff whole, the plaintiff’s injuries can be adequately compensated by the damages assigned by the court,<sup>260</sup> restored by the defendant under a court order, or prevented when the court imposed an obligation to enforce a contract between the parties. However, having the intent to make the plaintiffs whole in judicial reasoning and delivering outcomes in which the courts made the plaintiffs whole were not perfectly overlapped. For instance, in only four administrative GCs, courts had the intent to make the plaintiffs whole, but the courts in eight administrative GCs made the plaintiffs whole in the outcomes. Moreover, among these eight GCs, there is one GC, in which the court discussion does not suggest the intent to make the plaintiffs whole.

<sup>260</sup> The plaintiffs or a third party in 30.36% of the GCs (34) were assigned compensatory damages by the courts.

### B. Public/Private Interests and Formalism

China cannot simply be categorized as either a civil-law country or a common-law country.<sup>261</sup> On the one hand, Chinese courts apply and interpret statutes. On the other hand, the published GCs cite judicial interpretations and are *de facto* binding in future cases, even though these courts did not cite any precedents. In such a mixed jurisdiction, is citing legislative statutes or judicial interpretations associated with whether the court is concerned about public and private interests in adjudication? Are those concerns associated with the strategies of statutory interpretation or judicial reasoning?

This Section deploys logistic regressions to respond to these two questions by estimating whether the courts were concerned about public or private interests. The dependent variables capturing the public interest in a GC include (1) whether there was a state policy that backed the case; (2) whether the court was concerned about maximizing the public interest or utility; (3) whether the court protected a third party's interest; (3) whether the court protected the free market; and (4) whether the court addressed any social concerns in adjudication. The dependent variables capturing whether the court is concerned about private interests include (1) whether the court considered maximizing the interests or utility of the parties; (2) whether there was at least one party's interest or utility "abnormally" harmed after the adjudication; (3) whether the court considered making the plaintiff whole; and (4) whether the court discussed the extent of plaintiff's injuries. The dependent variables are binary categorical variables.

The independent variables capture (1) whether the GC cites a legislative statute in its reasoning (*i.e.*, "Reasons for the Adjudication"); (2) whether the court relied on a specific statute to rule or had to apply common-law rules for lack of specific statutes or make a rule to interpret vague statutes ("Specific Statutes"); and (3) whether the court cited a judicial interpretation. Statutes and common-law rules have formalistic differences between a civil-law system and a common-law system. The inherent difference between the two legal systems is how courts interpret statutes and apply common-law rules.<sup>262</sup> It is, again, a formalistic question, as Sunstein argues that formalism is an "interpretive strategy."<sup>263</sup> Thus, there are independent variables capturing (1) whether the court used syllogism to deduce the rule ("Syllogism"); (2) whether the court deduced the rule from abstracts or facts ("Abstract"); (3) whether the court only relied on the text or the plain meaning of legislative statutes or judicial interpretations ("Text of Law"); and (4) whether the court was semantic to interpret the statutes.<sup>264</sup>

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<sup>261</sup> *Supra* Part I.C.2.

<sup>262</sup> *See supra* Part I.

<sup>263</sup> Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U CHI. L. REV. 636, 638–39 (1999).

<sup>264</sup> There are only three GCs in which the courts deduced the rule by using an analogy. Whether a court deduces a rule by using an analogy, which is realism and opposed to formalism, shows collinearity with other variables, so it is omitted in the model and captured by other independent variables of formalism.

Table 4. Public/Private Interest Concerns and Characters of Legal Reasoning in the Guiding Cases

Table 4. Public/Private Interest Concerns and Characters of Legal Reasoning in the Guiding Cases									
VARIABLES	Public Interest Concerned					Private Interest Concerned			
	(1) Policy	(2) Max. Public's U.	(3) 3rd Party's Interest	(4) Free Market	(5) Social Concerns	(6) Max. Parties' U.	(7) U. Harmed	(8) Make P. Whole	(9) Injury Ext.
1.Syllogism	0.760 (0.583)	0.922 (0.733)	-0.804 (0.799)	0.854 (0.635)	-0.895 (0.580)	0.182 (0.537)	-0.249 (0.484)	-0.379 (0.589)	-0.345 (0.617)
1.Abstacts	-0.955* (0.550)	0.0694 (0.633)	0.209 (0.713)	0.224 (0.497)	0.0852 (0.514)	0.155 (0.464)	0.290 (0.442)	-0.184 (0.533)	0.317 (0.511)
1.Text of Law	-1.112* (0.568)	0.420 (0.722)	-0.797 (0.872)	0.307 (0.552)	-0.0286 (0.604)	0.745 (0.578)	0.448 (0.492)	0.999* (0.530)	1.429*** (0.503)
1.Statute Cited	-0.222 (0.538)	-0.788 (0.743)	0.730 (0.803)	-0.985* (0.570)	0.462 (0.575)	-0.304 (0.545)	0.0557 (0.496)	-0.103 (0.590)	-0.710 (0.553)
1. Judicial Inter.	0.190 (0.541)	-1.087* (0.604)	-1.842* (1.048)	-0.333 (0.475)	0.373 (0.547)	-0.650 (0.519)	-0.818* (0.469)	-0.681 (0.530)	-0.169 (0.470)
Cited									
1.Specific	-0.593 (0.628)	0.289 (0.687)	-0.777 (1.011)	-1.231** (0.615)	-0.0417 (0.544)	-0.472 (0.513)	-0.478 (0.530)	-0.356 (0.581)	-0.0497 (0.586)
Statues									
1.Semantic	-0.333 (0.921)	-0.0337 (1.077)	3.012 (2.086)	0.786 (0.701)	1.503* (0.796)	-0.800 (0.618)	0.859 (0.631)	0.517 (0.686)	0.344 (0.655)
i.Category	Y	Y	Y	Y	Y	Y	Y	Y	Y
Constant	-1.311* (0.675)	3.191*** (0.997)	2.229* (1.338)	-0.712 (0.564)	0.391 (0.639)	0.576 (0.610)	0.217 (0.553)	-1.271* (0.661)	-0.00621 (0.574)
Observations	112	112	52	112	90	112	112	112	112

Note: James Stock's Heteroskedasticity-standard errors in parentheses, \*\*\* p<0.01, \*\* p<0.05, \* p<0.1.

Note: James Stock's Heteroskedasticity-standard errors in parentheses, \*\*\* p&lt;0.01, \*\* p&lt;0.05, \* p&lt;0.1.

Table 4 shows the exact design of the logistic regressions and the regression results.<sup>265</sup> When estimating whether the court protected a third party's interest, Model 3 excludes the cases in which a third party is not a relevant approach. The independent variables are binary categorical variables. The category of the case (*i.e.*, criminal, civil, and administrative) is controlled in the models as a dummy variable for improving the robustness of the regression results. Positive coefficients suggest the dependent and independent variables are positively associated; Negative coefficients suggest a negative association between the dependent and independent variables. The coefficients on the independent variables without a star suggest that the association between the independent and dependent variables cannot be explored at a statistically significant level. The bigger absolute value of the coefficients suggests a stronger association between the dependent and independent variables.

The empirical results in Table 4 show two main findings, which are arguably consistent with the first and second fundamental hypotheses based on the public/private interest – concentrated spectrum in Figure 1. One finding is that the courts addressed public or private interests differently when they cited judicial interpretations. The difference did not exist when they cited legislative statutes. Precisely, on the one hand, the courts that cited judicial interpretations were less likely to consider maximizing the public utility and even far less likely to protect a third party's interest. It supports the first hypothesis with respect to legal formalism and common-law rules. On the other hand, the parties in these GCs were more likely to both be better-off or not “abnormally” harmed after the adjudication. Citing judicial interpretations does not mean that there were no specific statutes administering the legal issues. 68.97% of the twenty-nine GCs (20) that cite judicial interpretations deal with the legal issues that have corresponding clear and specific statutes. Among the eleven GCs in which the ruling courts used an empty legal concept (*i.e.*, “the rule of law”),<sup>266</sup> nine GCs did not find any judicial interpretations to apply. The second hypothesis with respect to realism cannot be perfectly supported: When courts did not find a specific statute to apply or used common-law rules, they were more likely to consider market orders.<sup>267</sup>

The other finding is that formalistic courts were more likely to consider the extent of plaintiff's injuries and making the plaintiff whole, regardless of what law the court cited and applied. However, whether courts followed syllogism to reason and rule is not associated with whether courts were concerned about public or private interests. When courts only relied on the text of the law, they were more likely to consider making the plaintiff whole and much more likely to discuss the extent of the plaintiffs' injuries. By contrast, these GCs are less likely to have a relevant state policy behind their legal issues. In other words, if there was a state policy backed the case, the court was less likely to be formalistic and merely rely on the text of legislative statutes or

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<sup>265</sup> There are seventy-five GCs following syllogism to deduce rules, and the rest thirty-seven GCs do not show a logic of syllogism. In forty-six GCs, the courts only relied on the text of the law. In sixteen GCs, the courts semantically interpreted the language of the law. The courts in sixty-six GCs deduced a rule from facts rather than abstracts. The data distribution with respect to other variables in the models of Table 4 is shown in Figure 2, Table 2, and Table 3.

<sup>266</sup> FISH, *supra* note 196, at 210.

<sup>267</sup> The opposite to the protection for a free market is not necessarily the construction of a regulatory market but can instead be non-protection for market orders.



judicial interpretations. Moreover, when courts semantically interpreted the language of the law, they were more likely to address a social concern. Overall, the second hypothesis is arguably supported.

### C. Public/Private Interests and Government Intervention

People are curious about how courts address their personal interests. Are they vulnerable in adjudication? How vulnerable are they, especially when the statutory law is vague or has gaps? Do courts have policy concerns and behave consistently with the government to take care of a third party or the public interest? If the government abuses the law, do courts correct the government for private parties or the public? It is arbitrary to respond to these questions by ideologically arguing or defining whether the law is public or private law. Alternatively, this research avoids these arguments and quantitatively responds to the above concerns by gathering the relevant information from the GCs.

Table 5. Government Intervention by Category of the GCs

Variables/Category of the GCs	<i>Criminal</i>	<i>Civil</i>	<i>Administrative</i>	<i>Total</i>
<i>1.Gov. Involvement</i>				
No	15	42	0	57
Yes	7	25	23	55
Per. of Yes	31.82%	37.31%	100.00%	49.11%
Total	22	67	23	112
<i>2.Gov. Interpretation</i>				
Preempted by Court	1	2	5	8
Deferred by Court	4	7	12	23
Per. of Deference	80.00%	77.78%	70.59%	74.19%
Total	5	9	17	31
<i>3.Gov. Decision</i>				
Preempted by Court	1	8	15	24
Deferred by Court	3	16	8	27
Per. of Deference	75.00%	66.67%	34.78%	52.94%
Total	4	24	23	51
<i>4.Expert Testimony</i>				
Private Expert	1	1	0	2
Gov. Expert.	0	6	3	9
Per. of Gov. Expert	0.00%	85.71%	100.00%	81.82%
Total	1	7	3	11
<i>5.Gov. Authority</i>				
No	16	52	1	69
Yes	6	15	22	43
Per. of Yes	27.27%	22.39%	95.65%	38.39%
Total	22	67	23	112
<i>6.Accountability</i>				
No	22	63	16	101
Yes	0	4	7	11
Per. of Yes	0.00%	5.97%	30.43%	9.82%
Total	22	67	23	112
<i>7.Gov. Legitimacy</i>				

No	20	63	6	89
Yes	2	4	17	23
Per. of Yes	9.09%	5.97%	73.91%	20.54%
Total	22	67	23	112

Table 5 lists the degree of government intervention in the GCs. In a criminal case, even though the state is the plaintiff, it does not automatically suggest interventions by the government power, so criminal cases are not coded as showing government involvement. By contrast, the government can be directly involved in a lawsuit if the government or a state-owned enterprise is a litigating party or testifying for the litigating parties. It can also be indirectly involved in a lawsuit if the government gives a monopoly right or public power to a private litigating party (or a private third party) of the lawsuit. Among the 112 GCs, 49.11% (55) show either direct or indirect government involvement. These GCs are more likely to address a policy concern but less likely to show that courts considered maximizing the interests of the parties.<sup>268</sup> In forty-three GCs, courts discussed or mentioned whether the government had a legitimate authority to intervene in the legal issues to some degree. In nine of the eleven GCs that courts allowed expert testimony, the courts assigned the government or a (state-owned) public research institute to provide the testimony.

The GCs do not challenge the government much. The government interprets and enforces the law.<sup>269</sup> Courts in eleven GCs discussed the accountability between the judicial system and the government, affirming or rejecting that the private parties had standing to sue the government or a government-backed institute in particular situations.<sup>270</sup> A GC that discusses the accountability is less likely to discuss the extent

<sup>268</sup> Pearson chi2 (for Gov. Intervention and Policy) = 5.2975, p = 0.021. Pearson chi2 (for Gov. Intervention and Max. Parties' U.) = 3.6999, p = 0.054.

<sup>269</sup> Xianfa art. 67, 107 (2018) (China).

<sup>270</sup> Wei Yongao Chen Shouzhi Su Laianxian Renmin Zhengfu Shouhui Tudi Shiyongquan Pifu An (魏永高、陈守志诉来安县人民政府收回土地使用权批复案) [Wei v. Lai'an], 2013 Sup. People's Ct. Guiding Case 22 (Anhui High People's Ct. 2012) (China) [hereinafter N.22 Guiding Case]; N.30 Guiding Case; Ruishi Jiaji Guoji Gongsu Su Fujian Jinshi Zhiyou Youxian Gongsu Deng Queren Hetong Wuxiao Jiufen An (瑞士嘉吉国际公司诉福建金石制油有限公司等确认合同无效纠纷案) [Cargill Int'l S.A. v. Jinshi Vegetable Oil Producing Co.], 2014 Sup. People's Ct. Guiding Case 38 (Sup. People's Ct. 2012) (China) [hereinafter N.38 Guiding Case] [hereinafter N.33 Guiding Case]; He Xiaohua Su Huazhong Keji Daxue Jujue Shouyu Xuewei An (何小强诉华中科技大学拒绝授予学位案) [He v. Huazhong Univ. of Sci. & Tech.], 2014 Sup. People's Ct. Guiding Case 39 (Hubei Wuhan Intermediate People's Ct. 2009) (China) [hereinafter N.39 Guiding Case]; Hainan Fenghai Liangyou Gongye Youxian Gongsu Su Zhongguo Renmin Caichan Baoxian Gufen Youxian Gongsu Hainansheng Fengongsi Haishang Huowu Yunshu Baoxian Hetong Jiufen An (海南丰海粮油工业有限公司诉中国人民财产保险股份有限公司海南省分公司海上货物运输保险合同纠纷案) [Fenghai Grain & Oil Indus. Co. v. Hainan Branch of PICC Prop. & Cas. Co.], 2015 Sup. People's Ct. Guiding Case 52 (Sup. People's Ct. 2003) (China) [hereinafter N.52 Guiding Case]; Bai Wangqing Su Chengdu Nanxun Wupin Yingxiao Fuwu Zhongxin Deng Qinhai Shiyongxinxing Zhuanliquan Jiufen (柏万清诉成都难寻物品营销服务中心等侵害实用新型专利权纠纷) [Bai v. Nanxun Goods Mktg. Serv. Center], 2015 Sup. People's Ct. Guiding Case 55 (Sup. People's Ct. 2012) (China) [hereinafter N.55 Guiding Case]; Dai Shihua Su Jinanshi Gongan Xiaofang Zhidui Xiaofang Yanshou Jiufen An (戴世华诉济南市公安消防支队消防验收纠纷案) Dai v. Public

of the plaintiff's injuries.<sup>271</sup> Moreover, thirty-one GCs address a government interpretation of law, and the courts in 71.19% of these GCs (23/31) deferred to the government interpretations. Fifty-one GCs are related to an earlier government decision. The courts in the criminal-law and civil-law GCs were more likely to defer to a government decision, but courts were more likely to preempt the government's decision in administrative cases when a party sued the government.

Table 6. Estimating the Probability to Maximize the Public Utility/Interest

VARIABLES	(1)	(2)	(3)	(4)	(5)	(6)
1. Max. Parties' U.	1.357** (0.677)	1.365** (0.681)	1.432** (0.695)	3.578** (1.542)	3.710** (1.636)	3.746** (1.674)
1. U. Harmed	1.580** (0.722)	1.613** (0.731)	1.781** (0.733)	4.212** (1.857)	4.618** (2.145)	4.658** (2.196)
1. Make P. Whole	-0.211 (0.644)	-0.215 (0.645)	-0.00648 (0.674)	0.215 (1.268)	0.368 (1.326)	0.432 (1.517)
1. Injury Ext.	0.142 (0.626)	0.168 (0.629)	-0.0845 (0.661)	2.095 (1.915)	2.334 (2.006)	2.297 (2.091)
1. Gov. Involvement			Y			Y
1. Gov. Authority			Y			Y
1. Accountability		Y	Y		Y	Y
i. Category.	Y	Y	Y	Y	Y	Y
Constant	1.603 (1.177)	1.578 (1.177)	1.781 (1.245)	-1.287 (1.345)	-1.891 (1.904)	-2.206 (3.135)
Observations	112	112	112	33	33	33

Note: James Stock's Heteroskedasticity-standard errors in parentheses, \*\*\* p<0.01, \*\* p<0.05, \* p<0.1.

Sec. Fire Prot. Brigade of Jinan, 2016 Sup. People's Ct. Guiding Case 59 (Shandong Jinan Intermediate People's Ct. 2012) (China) [hereinafter N.59 Guiding Case]; Wang Mingde Su Leshanshi Renli Ziyuan He Shehui Baozhangju Gongshang Rending An (王明德诉乐山市人力资源和社会保障局工伤认定案) [Wang v. Human Res. & Soc. Sec. Bureau of Leshan], 2016 Sup. People's Ct. Guiding Case 69 (Sichuan Leshan Intermediate People's Ct. 2012) [hereinafter N.69 Guiding Case]; Luo Rongrong Su Jianshi Wujiaju Wujia Xingzheng Chuli An (罗榕荣诉吉安市物价局物价行政处理案) [Luo v. Price Bureau of Ji'an], 2016 Sup. People's Ct. Guiding Case 77 (Jiangxi Jian Jizhou District People's Ct. 2012) (China) [hereinafter N.77 Guiding Case]; Zhang Daowen, Tao Ren Deng Sue Sichuansheng Jianyangshi Renmin Zhengfu Qinfan Keyun Renli Sanlunche Jingyingquan An (张道文、陶仁等诉四川省简阳市人民政府侵犯客运人力三轮车经营权案) [Zhang v. Jianyang, Sichuan Province], 2017 Sup. People's Ct. Guiding Case (Sup. People's Ct. 2016) (China) [hereinafter N.88 Guiding Case]; Jiaotong Yunshubu Nanhai Jiuzhuju Su Achanggeluosi Touzi Gongsi, Xianggang Andaousen Youxian Gongsi Shanghai Daibiaochu Hainan Jiuzhu Hetong Jiufen An (交通运输部南海救助局诉阿昌格斯投资公司、香港安达欧森有限公司上海代表处海难救助合同纠纷案) [Nanhai Rescue Bureau of the Ministry of Transp. v. Archangelos Inv. E.N.E.], 2019 Sup. People's Ct. Guiding Case (Sup. People's Ct. 2016) (China) [hereinafter N.110 Guiding Case]; Circular of the Supreme People's Court on Issuing the 21[st] Batch of Guiding Cases (promulgated by The Supreme People's Court of China, Feb. 25, 2019, effective Feb. 25, 2019), 2019 CHINA LAW LEXIS 154, 52.

<sup>271</sup> Pearson Chi-square (for Accountability and Injury Ext.) = 3.7658, p = 0.052.

Table 6 shows the association between the concerns of the courts about public and private interests. The dependent variable is whether the GC has a reasonable expectation of maximizing the public interest. The independent variables are binary variables, including (1) whether the court had a concern about maximizing the interests of the parties; (2) whether at least one party was “abnormally” harmed after the adjudication; (3) whether the court considered making the plaintiff whole; and (4) whether the court considered the extent of the plaintiff’s injuries. The models control for government involvement, government authority, the accountability between the judicial system and the government, and the category of the case as dummy variables. Model 4 to Model 6 narrow the samples to the GCs in which courts preempted or deferred to a government interpretation of law or a government decision.

Two key findings are shown in Table 6. First, whether courts were concerned with maximizing the public interest is positively associated with whether they were concerned with maximizing the interests of the litigating private parties. This finding could be inherent or endogenous because efficient private transactions benefit the public interest. The U.S. Constitution is also an example suggesting that protecting private interests could be the public interest.<sup>272</sup> The second finding is that a GC that is likely to maximize the public interest has a higher probability of delivering a decision that harms at least one party “abnormally” compared to the GCs without an expressive notion of or a potential for maximizing the public interest. This association between maximizing the public interest and whether at least one party was “abnormally” harmed after the adjudication is stronger than the positive association between maximizing the public interest and maximizing private interests. The two associations coexist when the models capture both of them and become stronger when the models capture government involvement and the legitimate authority of the government. These associations become much stronger among the GCs in which courts decided to defer or preempt a statutory interpretation made by the government or a government decision. Accordingly, the fourth hypothesis on the association between public and private interests is supported, which infers that the third hypothesis with respect to pragmatism could be proved.

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<sup>272</sup> See Macey, *supra* note 133, at 240, 267 (explaining that the U.S. Constitution protects the public interest but may harm individual rights in some circumstances when judges pursue the common good).

VARIABLES	3rd Party's Interest				Social Concerns		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
1. Max. Parties' U.	0.148 (0.692)	0.310 (0.699)	0.900 (1.085)	0.701 (1.173)	-1.093* (0.561)	-1.067* (0.560)	-0.929 (0.862)
1. U. Harmed	0.103 (0.656)	0.280 (0.663)	-0.702 (0.956)	-1.006 (1.082)	-0.177 (0.526)	-0.121 (0.539)	1.059 (0.863)
1. Make P. Whole	0.0980 (0.681)	0.227 (0.717)	0.236 (1.084)	0.279 (1.238)	1.267** (0.584)	1.318** (0.603)	1.336 (0.938)
1. Injury Ext.	0.511 (0.654)	0.505 (0.676)	-0.564 (0.972)	-0.0798 (1.206)	-0.799 (0.502)	-0.834 (0.514)	-1.004 (0.952)
1. Gov. Intervention		Y		Y		Y	Y
1. Gov. Authority		Y		Y		Y	Y
i. Category.							
Constant	2.889*** (1.114)	3.965*** (1.295)	2.881** (1.303)	5.426* (3.167)	0.980 (0.603)	1.609* (0.891)	0.204 (0.829)
Observations	90	90	33	33	90	90	33

Note: James Stock's Heteroskedasticity-standard errors in parentheses, \*\*\* p<0.01, \*\* p<0.05, \* p<0.1.

Table 7 is an extension of Table 6. It adopts the same independent variables but replaces the dependent variable to whether the court protected a third party's interests and whether the court addressed social concerns in adjudication. Models 3, 4, 7, and 8 narrow the samples to the GCs that the courts preempted or deferred to a government interpretation of law or a government decision.

The empirical results in Table 7 suggest two key characteristics of the GCs. First, the GCs do not show a statistically significant association between whether a court considered protecting the private interests of the parties and whether it protected a third party's interests. Second, the courts that addressed social concerns were more likely to consider making the plaintiffs whole, but less likely to consider maximizing the interests of the litigating parties. Among the courts that preempted or deferred to

the government, these two characteristics disappear. Overall, the public interest and private interests are associated in the language of the GCs, but the direction of the association is not clear. These statistical results are consistent with the fourth hypothesis and indirectly suggest that the GCs are mainly under pragmatism.

#### *D. Comparison with SCOTUS Decisions*

The frequency of various legal sources adopted by the GCs and SCOTUS decisions are divergent. The average rate of government deference on law interpretation (20.54%) in the GCs is at a higher level than SCOTUS decisions (5.34%, between 1890 and 1990,<sup>273</sup> 49% in 1996,<sup>274</sup> 14.5%, between 2006 to 2009<sup>275</sup>). The GCs cite legislative statutes twice as frequently as SCOTUS (except for in 1996, when all SCOTUS decisions used statutory language),<sup>276</sup> but the judicial sources cited in the GCs are about half of the amount of the judicial sources upon that SCOTUS relied.<sup>277</sup> Schacter showed a higher rate of applying “judicially-selected policy norms” (73%) by SCOTUS decisions compared to the GCs (36.61%).<sup>278</sup>

How Chinese courts applied various legal sources in the GCs, however, shows common patterns shared by SCOTUS in recent years. Compared to SCOTUS decisions in early years, the degree of adopting textual sources by Chinese courts in the GCs is slightly lower, and the degree of textualism in the GCs is even significantly lower. The judicial reasoning in 18.75% of the GCs (21/112) does not involve any textual sources of law, including legislative statutes, judicial interpretations, government regulations, or legal precedents. By contrast, besides legislative and executive statutory law, SCOTUS also adopts precedents as textual sources of law. However, how precedents are cited makes a difference in the law, and the development of the law is unclear.<sup>279</sup> Between 1890 and 1990, SCOTUS applied textual sources in about 85% of its decisions.<sup>280</sup> Even though the degree of textualism to interpret

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<sup>273</sup> Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1088, 1142 (1992). The limitation is that this study adopts random samples of SCOTUS decisions, rather than a full sample.

<sup>274</sup> Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 18 (1998).

<sup>275</sup> Krishnakumar, *supra* note 9, at 236. Krishnakumar’s research adopts a data scope between January 2006 to June 2009.

<sup>276</sup> Schacter, *supra* note 274, at 18.

<sup>277</sup> Zeppos, *supra* note 273, at 1094. 32.30% of the sources of authority in SCOTUS Opinions are legislative statutes, and 49.52% of the sources are judicial sources. By contrast, 68.75% of the GCs cite at least a legislative statute, and 25.89% of the GCs cite judicial interpretations.

<sup>278</sup> Schacter, *supra* note 274, at 18.

<sup>279</sup> See Whalen et al., *supra* note 238, at 118 (failing in finding empirical evidence to prove any association between precedent citations and how the courts deal with legal issues and rule).

<sup>280</sup> Zeppos, *supra* note 273, at 1104.

statutes decreased further, it was still higher than 10% in the late 1990's.<sup>281</sup> Textualists exclude public values, legislative history, and other policy considerations in their statutory interpretation.<sup>282</sup> Only one of the 112 guiding cases qualifies as textualism.<sup>283</sup> Between 2006 and 2009, SCOTUS cases adopted grammar or linguistic canons for law interpretation at a rate of 19.9%,<sup>284</sup> much lower than the GCs (41.07%). However, the GCs are more creative in interpreting the law compared to SCOTUS because they use materials other than the primary legal source of statutes in China.<sup>285</sup>

A limitation of the comparison between the GC system and the U.S. courts lacks a significant concern about the public values with respect to the U.S. Constitution and Federalism.<sup>286</sup> The reason for this limitation is that the political structure and governance philosophy of the two countries are different. However, the dimension to interpret cases based on how the judicial system treats the public interest allows two disparate systems to be reviewed and compared. It also explains why this research proposes this dimension and develops empirical analyses around this dimension.

When making decisions, the GCs suggest that Chinese judges do not engage in "judicial activism" more than the U.S. federal judges.<sup>287</sup> The public interest addressed by SCOTUS between 1986 and 1988 had a lower frequency on (1) making "common-law gap-filling rules" and concerning "liberal waiver of immunity for commercial

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<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 1102 ("Textualists seek to eliminate from statutory cases non-textual sources, particularly legislative history, public values, and other policy considerations."). See also Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60 (1988) (arguing that textualists should strictly follow the language of the statutes).

<sup>283</sup> Zhongguo Pingan Caichan Baoxian Gufen Youxian Gongsi Jiangsu Fengongsi Su Jiangsu Zhenjiang Anzhuang Jituan Youxian Gongsi Baoxianren Daiweiqiuchangquan Jiufen An (中国平安财产保险股份有限公司江苏分公司诉江苏镇江安装集团有限公司保险人代位求偿权纠纷案) [Jiangsu Branch of Pingan Prop. & Cas. Ins. Co. v. Zhenjiang Installation Grp. Co.], 2016 Sup. People's Ct. Guiding Case 74 (Jiangsu High People's Ct. 2014) (China) [hereinafter N.74 Guiding Case].

<sup>284</sup> Krishnakumar, *supra* note 9, at 236.

<sup>285</sup> *Id.* 67.5% of SCOTUS decisions relied on the plain meaning of the law. 65.18% of the GCs adopt sources other than the language of the statutes to interpret the law.

<sup>286</sup> See BARRY BOZEMAN, PUBLIC VALUES AND PUBLIC INTEREST: COUNTERBALANCING ECONOMIC INDIVIDUALISM 3 (2007). Public values are a set of the public interest, so this research adopts a general concept of the public interest and does not differentiate particular types of the public interests.

<sup>287</sup> "Judicial Activism" is a term argued in a large volume of literature. I address this term here to refer whether a court applies law departing from the text of the law for political or policy reasons. See William Wayne, *The William Wayne Justice, The Two Faces of Judicial Activism*, 61 GEO. WASH. L. REV. 1, 1-2 (1992) (referring to a "political ritual"); Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 COLO. L. REV. 1139, 1141 (2002) (defining "activism" by "focusing on court's willingness to strike down laws, to depart from the authority of text, history, and/or precedent, . . . , or to impose intrusive remedial orders on political actors").

enterprises”; (2) deference to agency decisions or agency interpretations of law; and (3) preservation of state regulations, compared to the public interest addressed in the GCs.<sup>288</sup> The Chinese judges adjudicating the GCs had a slightly higher probability of deferring to a government decision than preempting a government decision.<sup>289</sup> By contrast, the probability of deferring to rather than preempting a government decision was much higher among the U.S. federal appellate judges in 2008.<sup>290</sup> The most frequent reason to preempt a government decision is social security in the U.S., but is the social wealth in the GCs.<sup>291</sup>

#### IV. IMPLICATIONS

GCs are a SPC tool for instructing the inferior courts, the judicial system, and society. GCs present the SPC’s standards for adjudication, even though the cases can be only of limited persuasive value for showing the current adjudication because of the limitations of the data size and the expression of the GCs.<sup>292</sup> These GCs draw a map for the future of adjudication, law interpretation, judicial reasoning, and law enforcement expected by the SPC. Therefore, a systematic GC review reveals this probable future and the SPC’s expectations.

##### A. Strengthen Law Enforcement

Besides the intent and purpose of the SPC to improve adjudicative consistency,<sup>293</sup> GCs function to strengthen law enforcement in China. The authority of judicial

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<sup>288</sup> Eskridge, *supra* note 68, at 1095. These public values were coded by Eskridge Jr. and this research follows his coding strategy to record the public values addressed by the GCs.

<sup>289</sup> The Chinese judges deferred agency decisions in twenty-seven GCs, three GCs more than they preempted agency decisions.

<sup>290</sup> See Corey Rayburn Yung, *Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts*, 105 NW. L. REV. 1, 4 (2011). The U.S. federal appellate court judges deferred agency decisions three times higher (about 287 cases more) than they preempted agency decisions in 2008.

<sup>291</sup> *Id.* (“[67 of 122 times that a federal appellate court reversed an executive agency determination] were Social Security cases.”).

<sup>292</sup> See discussion *supra* Part II.C. Doctrinal and institutional analyses suggest broad judicial discretion in China. See Hu Yunteng & Yu Tongzhi, *The Studies on the Key Complex and Arguable Problems of the Case Guidance System*, 6 LEGAL STUD. 3, 18 (2008); see also Zhang Zhiming, *The Basic Understanding of Establishing a Case Guidance System in China*, LEGAL DAILY, Jan. 5, 2011, at 87.

<sup>293</sup> Weimin Jr., *supra* note 12, at 2.



interpretations<sup>294</sup> and agency interpretations<sup>295</sup> were controversial before there were GCs addressing them. Because of the *de facto* binding nature of GCs, not only are the inferior courts guided, but people who are governed by the relevant legislative statutes also should pay attention to the GCs and the judicial interpretations and government regulations addressed in the GCs. Moreover, the SPC has the intent to enforce the law for improving judicial efficiency, even though it is an empirical and normative question whether the law from the above sources is economically efficient or effective to deter particular behaviors.

Because GCs use multiple legal sources to interpret the law, the enforcement of judicial interpretations, government regulations, and agency interpretations are strengthened. For example, in the background of *Zhang v. Jianyang*, the local government of Jianyang Municipality in Sichuan province ignored the SPC judicial interpretations for the Administrative Law when it issued Notices administrating transportation issues.<sup>296</sup> The ruling court cited the judicial interpretations and ruled that the Notices were void.<sup>297</sup> This GC suggests that judicial interpretations are *de facto* binding to local governments through judicial power.

Moreover, besides the guidance on law interpretation, the GCs provide specific or strategic methods for the inferior courts to verify the facts in law enforcement. For example, in *Shi v. Huaren Elec. Info. Co., Ltd.*, a GC about copyright infringement, the court had technical challenges to understand the accused-infringing software and compare it with the copyrighted software to determine copyright infringement.<sup>298</sup> The

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<sup>294</sup> The term of judicial interpretation can be applied in a broad sense, including but not limited to any opinions, explanations, or other documents that the SPC or SPP (Supreme People's Procuratorate) promulgates to specify rules. Before GCs, the judicial interpretations are only in the form of written rules or responses to the questions raised by the inferior courts. See Chenguang Wang, *Law-Making Functions of the Chinese Courts: Judicial Activism in a Country of Rapid Social Changes*, 4 FRONT. L. CHINA 524, 537–544 (2006); see also Li Guoguang, *vice president of the Supreme People's Court, explains the legal system for people's medication*, SINA (Sept. 29, 2002), <http://news.sina.com.cn/c/2002-09-29/0757749891.html>; see generally Cris X. Li, *A Quiet Revolution: An Overview of China's Judicial Reform*, 4 ASIAN-PACIFIC L. & POL'Y J. 255 (2003) (discussing the conflicts between judicial interpretations and the Constitution of China).

<sup>295</sup> Constitutional law scholars frequently discuss the authority of government regulations from the dimension of “judicial constitutionalism.” See Paul Gewirtz, *Constitutional Enforcement: Who Should Do It and How?*, 4 CHINA L. REV. 1, 3 (Oct. 2016); see generally Keith Hand, *Resolving Constitutional Disputes in Contemporary China*, 7 U. PA. E. ASIA L. REV. 51 (2012); see also Albert H. Y. Chen, *The Discourse of Political Constitutionalism in Contemporary China: Gao Quanxi's Studies on China's Political Constitution*, 14 CHINA REV. 183, 195 (2014).

<sup>296</sup> See N.88 Guiding Case, *supra* note 270, at 3.

<sup>297</sup> *Id.*

<sup>298</sup> In order to determine copyright infringement, the plaintiff should establish two elements, access and substantial similarity, which are similar as the standards of copyright infringement in the U.S. See Shi Hongli Su Taizhou Huaren Dianzi Zixun Youxian Gongsi Qinhai Jisuanji Ruanjian Zhuzuoquan Jiufen An (石鸿林诉泰州华仁电子资讯有限公司侵害计算机软件著作权纠纷案) [*Shi v. Huaren Elec. Info. Co.*, 2015 Sup. People's Ct. Guiding Case 49] (Jiangsu High People's Ct. 2006) (China) [hereinafter N.49 Guiding Case].

plaintiff also had difficulty in explaining the accused software due to the same technical challenges, and the defendant refused to provide the information. Under this circumstance, the court created a test based on the expert testimony to determine the similarities between the two software programs. Selecting a GC like *Shi* suggests that the SPC deliberately tries to decrease the transaction costs within the judicial system, not merely for improving adjudicative consistency but also for improving judicial efficiency.

### B. Public Interest Concerns in Adjudication

The SPC encourages the judicial system to address the public interest and use policy concerns to fill the gaps in statutory law, which does not necessarily harm private interests and is similar to some realistic U.S. courts.<sup>299</sup> Most GCs address the public interest to some extent or from different approaches. A common characteristic shared by these GCs is that the ruling courts were less likely to address the concerns about the public interest when there were clear and specific statutes or judicial interpretations before them. In other words, the courts that did not strictly follow the text of the law or use judicial interpretations were more likely to address the concerns about the public interest.

The GCs as policy data suggest that Chinese courts should address public concerns, particularly when the courts cannot find any clear and specific statutes or judicial interpretations to solve the legal issues. For example, twenty-two GCs deal with IP protection because it is frequently addressed in state policies for promoting innovation.<sup>300</sup> In these GCs, the courts protected market orders, follow-on innovators, and the general public welfare.<sup>301</sup>

Precisely, in *Tianlong Seed Tech. Co., Ltd. v. Xunong Seed Tech. Co., Ltd.*, even though the court determined that both parties infringed the other party's plant varieties based on the Protection of New Varieties of Plants, the seeds were processed based on the two plant varieties owned by the opposing parties.<sup>302</sup> Therefore, the court

<sup>299</sup> Singer, *supra* note 54, at 485 (arguing that U.S. courts consider the general welfare when fill gaps in some contracts).

<sup>300</sup> See, e.g., People's Republic of China National Economic and Social Development Eighth Five-Year Plan (promulgated by Nat'l People's Cong., Apr. 9, 1991), available on file at Cleveland State Law Review; People's Republic of China National Economic and Social Development Ninth Five-Year Plan (promulgated by Nat'l People's Cong. Mar. 17, 1996), available on file at Cleveland State Law Review.

<sup>301</sup> See Runhua Wang, *New Private Law? Intellectual Property "Common-Law Precedents" in China*, 89 UMKC L. REV. (forthcoming 2020); Runhua Wang, Stimulating Technical Innovation by Small and Medium-Sized Enterprises in China (July 11, 2016) (unpublished J.S.D. Dissertation, University of Illinois at Urbana-Champaign) (on file with University of Illinois at Urbana-Champaign). The main innovators in China are follow-on innovators, rather than pioneer innovators in the developed countries, such as the U.S.

<sup>302</sup> China does not have plant patents, but it has a similar system of New Varieties of Plants to protect patents. See *Tianjin Tianlong Zhongye Keji Youxian Gongsi Yu Jiangsu Xunong Zhongye Keji Youxian Gongsi Qinhai Zhiwu Xinpinzhong Jiufen An* (天津天隆种业科技有限公司与江苏徐农种业科技有限公司侵害植物新品种权纠纷案) [*Tianlong Seed Tech. Co. v. Xunong Seed Tech. Co., Ltd.*], 2017 Sup. People's Ct. Guiding Case 86 (Jiangsu High

discussed the importance of the public welfare (*i.e.*, grain) in its judicial reasoning and assigned compulsory licenses of the two plant varieties to both parties and a lead-time compensation to the one party, which developed its plant variety earlier than the other.<sup>303</sup> Therefore, both parties can deploy the two patents in the future, and the public will be benefited when the grain is produced successfully based on the two plant varieties.<sup>304</sup>

### *C. Policy Concerns and a Future of Pragmatic Judicial System*

According to the empirical evidence in this research, the SPC expects to construe a pragmatic judicial system in China, which embraces both formalistic and realistic law interpretation and enforcement. This is also why the empirical results are arguably consistent with the fundamental hypotheses, especially the first and second hypotheses with respect to legal formalism and legal realism. In other words, the judges can be both formalistic and realistic, and their reasoning does not systematically advantage the public interest or private interests.

On the one hand, the GCs suggest that the structure of court opinions, judicial reasoning, and law interpretation can be formalistic in China. The SPC provides the GCs as templates of judicial opinions for the inferior courts to study and follow. The GCs are ideal study materials to train Chinese judges in writing and thinking. On the other hand, the SPC encourages that Chinese courts have policy concerns. Besides solving the backward disputes, their adjudications should be forward-looking and adjust the relationship between the government and society. It is realistic, but disparate from a normative concern whether the judicial system of China is independent or not, especially when there are several GCs preempting agency interpretations of law and agency decisions and affirming standing of private parties on administrative issues.<sup>305</sup> The application of the policy concerns in the GCs implies practical legal reasonings in adjudication, even though it may suggest the concerns about the public interest at a limited level.<sup>306</sup>

For instance, *Wei v. Lai'an* addresses a policy concern over land and government activities when confirming the plaintiff's standing to sue the government.<sup>307</sup> In *Wei*, the plaintiff sued the local government for the government's Replies, in which it

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People's Ct. 2013) (China) [hereinafter N.86 Guiding Case]; *see also* Regulation of the People's Republic of China on Protection of New Varieties of Plants (promulgated by St. Council, Oct. 1999, effective Oct. 1, 1997) art. 6 (China).

<sup>303</sup> *See* N.86 Guiding Case, *supra* note 302, at 7.

<sup>304</sup> *See id.*

<sup>305</sup> *See* Farber & Frickey, *supra* note 143, at 885 (raising an argument that public law may need private litigations as an enforcement tool).

<sup>306</sup> *See* Feinman, *supra* note 60, 724–25.

<sup>307</sup> N.22 Guiding Case, *supra* note 270, at 4; *see* Daquan Huang et al., *How Do Differences in Land Ownership Types in China Affect Land Development? A Case from Beijing*, 9 SUSTAINABILITY 1, 1–4 (2017) (introducing different types of land ownership in China and suggesting a strong concern over governance behind the design of these types of land ownership).

requested the recovery of some land used by the plaintiff.<sup>308</sup> The rules in *Wei* are generally consistent with the U.S. standing requirements.<sup>309</sup> This GC rules that there is no standing in general for any individuals or any organizations to sue administrative Replies that were made by local governments because the Replies are “internal administrative acts.”<sup>310</sup> It also rules that a plaintiff has standing to sue the government on the issue that the administrative actions (in the form of Replies) have “an actual impact” on his or her rights (and obligations).<sup>311</sup> In addition to *Wei*, there are another ten GCs that address standing issues and have direct or indirect government involvement.<sup>312</sup> Overall, the judicial reasoning in this judicial system is more moderate and practical than radical and critical.<sup>313</sup>

## V. CONCLUSION

With the emergence of GCs, the Chinese judicial system is recognized as mixed and dynamic. Using the dichotomy of civil law and common law to describe such a modern judicial system is outdated because the Chinese system exhibits characteristics from both. This Article empirically reviews all the GCs published before November 2019 and unveils the judicial system in China from a perspective of how Chinese courts address public and private interests.<sup>314</sup> This empirical research suggests that Chinese courts are both formalistic and realistic.

Overall, China is on a path towards legal pragmatism. The SPC instructs the inferior courts to include policy concerns and consider the public interest in their judicial reasoning. The judicial system in China shares some common characteristics with the U.S. judicial system, such as the legal sources used by courts and the institutional norm of pragmatism. The SPC suggests a balance between government deference and judicial powers in a manner of using GCs as legal sources.

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<sup>308</sup> N.22 Guiding Case, *supra* note 270, at 2–3 (stating plaintiff only owned the use right on the land, rather than a full property right).

<sup>309</sup> *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an ‘injury in fact’ – an invasion of legally protected interest which is (a) concrete and particularized, [meaning that the injury must affect the plaintiff in a personal and individual way,] and (b) ‘actual or imminent, not conjectural or hypothetical’ . . .”).

<sup>310</sup> N.22 Guiding Case, *supra* note 270, at 2.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* *See generally supra* note 270.

<sup>313</sup> *See* Feinman, *supra* note 60, at 731 (concluding that critical legal reasoning is radicalism, and practical legal reasoning is liberal, moderate, and conservative).

<sup>314</sup> The SPC published another 27 GCs after publishing 112 GCs addressed in this Article in December, 2019. The Supreme People’s Court, *Press Conference of the Supreme People’s Court on Issuing the 22[nd] to 24[th] Batches of Guiding Cases*, THE SUPREME PEOPLE’S COURT OF THE PEOPLE’S REPUBLIC OF CHINA (Jan. 14, 2020, 11:12AM), <http://www.court.gov.cn/zixun-xiangqing-216731.html>.

Based on the systematic overview of the GCs published by November 2019, I suggest that future research should provide more normative analyses for specific public interests and policies addressed in the GCs. Moreover, future research should conduct more empirical analyses on how the inferior courts apply GCs and address these public interests and policies.